No. 01-1806-CSX Title: Lisa Madigan, Attorney General of Illinois, Petitioner
v.
Telemarketing Associates, Inc., et al.

Docketed:
June 13, 2002 Court: Supreme Court of Illinois

Entry	Date	Proceedings and Orders
	Apr 18 2002	Application (01A807) to extend the time to file a petition for a writ of certiorari from May 5, 2002 to June 5, 2002, submitted to Justice Stevens.
	Apr 25 2002	Application (01A807) granted by Justice Stevens extending the time to file until June 5, 2002.
	Jun 5 2002	Petition for writ of certiorari filed. (Response due July 13, 2002)
	Jul 12 2002	Brief amici curiae of Florida, et al. filed.
	Jul 24 2002	DISTRIBUTED for Conference of September 30, 2002
	Aug 29 2002	Response requested.
	Sep 30 2002	Brief of respondents Telemarketing Associates, Inc., et al. in opposition filed.
	Oct 11 2002	Reply brief of petitioner James Ryan, Attorney General of Illinois filed.
	Oct 16 2002	REDISTRIBUTED for Conference of November 1, 2002
	Nov 4 2002	Petition GRANTED. SET FOR ARGUMENT March 3, 2003. **********
	Dec 5 2002	Motion of respondent Telemarketing Associates to strike portions of petitioner's joint appendix designations filed.
	Dec 9 2002	Petitioner's response to respondents' motion to strike portions of joint appendix designations filed.
	Dec 11 2002	Order extending time to file the joint appendix and petitioner's brief on the merits to and including December 24, 2002.
	Dec 16 2002	Motion of respondent Telemarketing Associates to strike portions of petitioner's joint appendix designations DENIED.
	Dec 19 2002	Brief amici curiae of Council of Better Business Bureaus, Inc., et al. filed.
	Dec 24 2002	Brief amici curiae of Florida, et al. filed.
	Dec 24 2002	Joint appendix filed.
	Dec 24 2002	Brief of petitioner Illinois ex rel James E. Ryan, attorney General filed.
	Dec 26 2002	Brief amici curiae of United States, et al. filed.
	Dec 26 2002	Brief amicus curiae of AARP filed.
	Dec 26 2002	LODGING consisting of twenty copies of related material received from counsel for amicus, AARP.
	Jan 2 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Jan 10 2003	CIRCULATED.
	Jan 15 2003	Record filed.
	Jan 21 2003	Brief amicus curiae of Disabled American Veterans filed.
	Jan 23 2003	Brief of respondents Telemarketing Associates,Inc., Richard

No. 01-1806-CSX

Entry	Date	Proceedings and Orders
		Troia and Armet,Inc. filed.
	Jan 23 2003	Brief amici curiae of Free Speech Defense and Education Fund, et al. filed.
	Jan 23 2003	Brief amicus curiae of American Teleservices Association filed.
	Jan 23 2003	Brief amici curiae of Independent Sector, Advocacy Institute, et al. filed.
	Jan 23 2003	Brief amici curiae of Public Citizen, Inc., et al. filed.
	Jan 23 2003	Brief amici curiae of Association of Fundraising Professionals, et al. filed.
	Jan 23 2003	Brief amici curiae of Commercial Fundraisers, Abbe & Associates, et al. filed.
	Jan 23 2003	Brief amicus curiae of Hudson Bay Company of Illinois filed.
	Jan 24 2003	Motion of Association of Fundraising Professionals, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
	Feb 20 2003	Reply brief of petitioner Lisa Madigan, Attorney General of illinois filed.
	Feb 21 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Feb 21 2003	Motion of Association of Fundraising Professionals, et al. for leave to participate in oral argument as amici curiae and for divided argument DENIED.
	Mar 3 2003	ARGUED.

Supreme Court, U.S.
FILED

No. 011806 JUN - 5 2002

OFFICE OF THE CLERK

In the
Supreme Court of the United States

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, ATTORNEY GENERAL OF THE STATE OF ILLINOIS,

Petitioner,

v.

TELEMARKETING ASSOCIATES, INC., RICHARD TROIA and ARMET, INC.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Amendment categorically prohibits a State from pursuing a fraud action against a professional fundraiser who represents that donations will be used for charitable purposes but in fact keeps the vast majority (in this case 85 percent) of all funds donated.

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PETITION FOR A WRIT OF CERTIORARI

The People of the State of Illinois *ex rel.* James E. Ryan, Attorney General of Illinois, respectfully petition this Court for a writ of *certiorari* to review the judgment of the Illinois Supreme Court in this case.

OPINIONS BELOW

The opinion of the Illinois Supreme Court (App. 1 - 17) is reported at 198 Ill. 2d 345 and 763 N.E.2d 289. The opinion of the Illinois Appellate Court (App. 19 - 29) is reported at 313 Ill. App. 3d 559 and 729 N.E.2d 965. The final judgment of the Illinois Circuit Court (App. 30 - 31) is unreported.

JURISDICTION

The judgment of the Illinois Supreme Court was entered on November 21, 2001. The Illinois Supreme Court denied the petitioner's timely petition for rehearing on February 2, 2002. (App. 18.) On April 25, 2002, Justice Stevens extended the time within which to file a petition for writ of *certiorari* to June 5, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

U.S. Const. amend. I.

STATEMENT OF THE CASE

Telemarketing Associates, Inc. ("Telemarketing") is a for-profit company engaged in the business of telephoning people at home and asking for donations on behalf of various not-for-profit organizations. This case involves Telemarketing's activities on behalf of VietNow, whose national headquarters is in Illinois. Pursuant to its agreements with VietNow, Telemarketing calls individuals to ask for donations, telling them that their contributions will be used for charitable purposes, including providing food, shelter and financial support for hungry, homeless and injured Vietnam War veterans. A common representation is that donations will be used to buy food baskets for needy veterans. In fact, Telemarketing keeps 85 percent of the donations it generates pursuant to its agreements with VietNow, which in turn spends only about 3 percent of all the money raised by Telemarketing to provide such charitable services to veterans.[1]

Petitioner, the People of Illinois *ex rel.* James E. Ryan, the Illinois Attorney General ("Illinois"), sued Telemarketing, its owner, Richard Troia, and Armet, Inc., an affiliated company (collectively "Respondents"), in the Circuit Court of Cook County, Illinois, alleging common law fraud and violations of Illinois' general anti-fraud statutes. The complaint alleged that Respondents' representations regarding how donors' contributions would be used were false and misleading, were made for the purpose of deceiving people for Respondents' financial gain, and had the actual effect of doing so.

---

[1] VietNow's revenues, fundraising and program expenses are reported in its IRS Form 990 for 2000, which is published by the California Attorney General and available on the internet at http://justice.hdcdojnet.state.ca.us/charitysr/default.asp, and is summarized by the Better Business Bureau Wise Giving Alliance at http://www.give.org/reports/vn.asp.

Respondents moved to dismiss the complaint, arguing that the fraud claims against them were barred by the First Amendment. The trial court granted this motion, and its judgment was affirmed by the Illinois Appellate Court (App. 19-29) and by the Illinois Supreme Court (App. 1-17). The Illinois Supreme Court acknowledged "the potential for donor confusion which may be presented with fundraising solicitations of the sort involved in the case at bar." (App. 17.) However, believing its judgment to be "compel[led]" by this Court's decisions in *Village of Schaumburg v. Citizens For a Better Environment*, 444 U.S. 620 (1980), *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), and *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), the court held that the First Amendment categorically precluded any reliance on the percentage of charitable donations kept by Respondents to support a fraud claim against them. (App. 5-6, 12-17.)

REASONS FOR GRANTING THE WRIT

The Court should grant *certiorari* to resolve a constitutional issue of substantial public importance: whether the First Amendment categorically prohibits a State from pursuing a fraud action against a professional fundraiser who represents that donations will be used for charitable purposes but in fact keeps almost all the funds donated. This is an issue reserved by the Court's prior decisions regarding charitable solicitations, all of which involved facial challenges to statutes regulating solicitation costs, not an individual action for fraud.

The Illinois Supreme Court was right that "this case has far-reaching implications for all fundraisers." (App. 16.) Charitable solicitation generates over $200 billion a year, with an ever greater volume handled by professional telemarketing companies. By holding that the percentage of charitable donations kept by a fundraiser may *never* be

used to support a claim that it committed fraud, the Illinois Supreme Court did more than misinterpret this Court's precedents. It transformed the First Amendment into a license for unscrupulous fundraisers to defraud the public in the name of raising money for charity, thereby dealing a crippling blow to one of the States' principal weapons against telemarketing fraud. The Court should grant *certiorari* to rectify this serious constitutional error and to provide much-needed guidance regarding any limits the First Amendment imposes on generally applicable fraud principles in the context of charitable solicitations.

I. The Illinois Supreme Court Misread this Court's Opinions When it Held that the First Amendment Gives Fundraisers the Right to Mislead the Public that Donations Will Be Used for Charitable Purposes.

Because this case involves an "as applied" challenge to Illinois' general anti-fraud laws, the question presented is whether the First Amendment gives Respondents the right to do what Illinois alleged. *See New York v. Ferber*, 458 U.S. 747, 767-68, 773-74 and n.28 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 615-16 (1973); *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461-62 (1945). Stated generically, that question is whether a professional fundraiser has a First Amendment right to mislead people into giving money by representing that it will be used for charitable purposes, when actually the fundraiser keeps the vast majority of all money donated. Answering this question in the affirmative, the Illinois Supreme Court misapplied this Court's precedents in *Village of Schaumburg v. Citizens For a Better Environment*, 444 U.S. 620 (1980), *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), and *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988). Those cases did not impose any constitutional limits on common law fraud

claims in the area of charitable solicitations, but instead invalidated statutory schemes that, in the name of preventing fraud, "aimed at something else in the hope that [they] would sweep fraud in during the process." *Munson*, 467 U.S. at 969-970.

Indeed, this case, involving an individual action alleging actual fraud, represents precisely what the Court in *Schaumburg*, *Munson* and *Riley* said was a constitutionally permissible means for States to further their important interest in protecting the public from fraud. *See, e.g.*, *Riley*, 487 U.S. at 795 ("we do not suggest that States must sit idly by and allow their citizens to be defrauded"); *id.* at 800; *Schaumburg*, 444 U.S. at 637 and n.11. Those decisions accordingly do not support the Illinois Supreme Court's decision in this case, which seriously impairs the States' ability to stop actual fraud committed under the guise of collecting money for charitable activities.

A. This Court's Prior Decisions Addressed Only State Statutes Restricting Charitable Fundraising Expenses Above a Fixed Percentage.

In *Schaumburg*, *Munson* and *Riley*, the Court sustained "facial" challenges to statutes under which charitable fundraising expenses above a certain percentage (which in those cases ranged from 25 percent to 35 percent) were declared *per se* unlawful or shifted to the fundraiser the burden of proving that its fee was "reasonable." The central teaching of those cases is that a statutorily-prescribed level of fundraising expenses is not *alone* a constitutionally valid basis to restrict charitable solicitations. It does not follow, however, that where a professional fundraiser *does* represent that donations will be used for charitable purposes, the percentage it turns over to the charity in whose name it seeks donations—and, conversely, the percentage it keeps—is *never* relevant to support a claim that the fundraiser committed fraud.

Two principal justifications were offered in defense of the statutes challenged in *Schaumburg*, *Munson* and *Riley*: maximizing the amount of money actually devoted to charitable activities, and protecting the public from fraud. *See Riley*, 487 U.S. at 789-90, 792. The Court found neither of these justifications sufficient.

The Court first concluded that, even though charitable solicitations may contain a component of commercial speech, they are entitled to heightened First Amendment scrutiny, with the consequence that any statutory restrictions must be narrowly tailored in furtherance of an important governmental interest. *See, e.g., Munson*, 467 U.S. at 960-61. The Court then noted a number of legitimate reasons why a charity might have high fundraising costs, including that it was recently formed, is unpopular, or devotes most of its revenues to public advocacy. *Id.*, 467 U.S. at 966-67; *Riley*, 487 U.S. at 791-92.

Addressing the first offered justification for fixed percentage limits on fundraising expenses, the Court held that restricting speech based on the government's view of what is "reasonable" violates the core First Amendment principle that the government may not play favorites in the marketplace of ideas. *See Riley*, 487 U.S. at 790-91. The additional feature of the statute challenged in *Riley* which, instead of treating fundraising expenses above 35 percent as *automatically* unlawful, required the fundraiser to prove the "reasonableness" of its expenses, simply substituted one constitutional deficiency for another, inasmuch as it improperly imposed on the party engaged in protected speech the burden of proof regarding its right to do so. *Riley*, 487 U.S. at 793-94; *see also Speiser v. Randall*, 357 U.S. 513, 524 (1958).

With respect to the second proposed justification, the Court held that, although protecting the public from fraud is an important governmental interest, high solicitation costs, *without more*, do not closely equate with actual fraud.

As the court noted in *Munson*, the statute challenged in that case improperly assumed that there is a "necessary connection between fraud and high solicitation and administrative costs" and operated on the "fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud." *Munson*, 467 U.S. at 961, 966. Thus, the Court held, a statutorily prescribed percentage limit on solicitation costs is facially invalid because it not only covers a substantial amount of constitutionally protected speech, but also uses a criterion—*i.e.*, high solicitation costs *alone*, without regard to what the public was told—that is inherently inadequate to identify actual fraud. *Id.* at 964-68 and n.13.

B. This Court Expressly Approved of State Fraud Actions Against Deceptive Charitable Solicitations, Which Illinois Attempted to Bring.

In *Schaumburg*, *Munson* and *Riley*, the Court repeatedly emphasized that to further their compelling interest in combatting actual fraud, States may vigorously enforce their general laws against fraud. *Schaumburg*, 444 U.S. at 637 and n.11, 639; *Riley*, 487 U.S. at 800. Indeed, the Court has never considered fraud protected speech under the First Amendment. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995); *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 191 (1948); *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940); *Schneider v. State*, 308 U.S. 147, 164 (1939). In this case, Illinois has pursued the very avenue for attacking fraud that this Court left it.

Consistent with the law of most other States, Illinois defines fraud as the express or implied assertion of a material fact that is false, that is made with the intent to deceive another person, and that the other person reasonably relies on to her detriment. *In re Witt*, 145 Ill. 2d 380, 390-91, 583 N.E.2d 526, 531 (1991); *Glazewski v. Coronet*

Ins. Co., 108 Ill. 2d 243, 249-50, 483 N.E.2d 1263, 1266 (1985); *see also Pence v. United States*, 316 U.S. 332, 338 (1942) (listing traditional elements of fraud); *see generally* Page Keeton, *et al.*, *Prosser and Keeton on The Law of Torts*, §§ 106-110 (5th ed. 1984). Illinois also follows the generally prevailing view that statements which are ambiguous or even literally true may be fraudulent where they are intended to create a misleading impression, such as asserted facts that are deceptive in light of other undisclosed information. *In re Witt*, 145 Ill. 2d at 390, 583 N.E.2d at 531; *Glazewski*, 108 Ill. 2d at 250, 483 N.E.2d at 1266; *People v. Gilmore*, 345 Ill. 28, 46, 177 N.E.2d 710 (1931); *Buechin v. Ogden Chrysler-Plymouth, Inc.*, 159 Ill. App. 3d 237, 247-48, 511 N.E.2d 1330, 1336 (Ill. App. 1987); *see also Equitable Life Insurance Co. of Iowa v. Halsey, Stuart & Co.*, 312 U.S. 410, 426 (1941) ("a statement of a half-truth is as much a misrepresentation as if the facts stated were untrue") (applying Iowa law); *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 188-89 (1948) (construing mail fraud statute); *Prosser and Keeton on The Law of Torts*, *supra*, § 106 at 736-38; Restatement (2d) of Torts, § 525, comments *b*, *e*, § 526, comment *f*, § 527, § 529, comments *a*, *b* (1977).[2]

In accord with these principles, Illinois' complaint against Respondents alleges all of the elements of common law fraud, as well as the similar elements of Illinois' generally-applicable anti-fraud statutes. In particular, the complaint alleged that Respondents made an assertion of "fact"

[2] Particularly relevant is *United States v. Ciccone*, 219 F.3d 1078 (9th Cir. 2000), in which the court affirmed a wire fraud conviction against the head of a company that solicited charitable donations, noting that "the pitch's claim that 'FEED AMERICA . . . feeds the homeless of America' was *hardly true* given that over $2 million went into Ciccone's account" and "only $149,286.65 [went] to legitimate charities." 219 F.3d at 1080-81, 1084 (emphasis added).

when they told potential donors that contributions would be used for charitable purposes; that they did so with the intent to mislead and defraud the public; that members of the public reasonably understood this representation to mean that much more than 15 percent of their donations would actually go to such charitable uses; and that they would not have made such donations if they knew Respondents actually kept 85 percent of all the money they raised.

C. This Court's Precedents Do Not Preclude Using Evidence of a Fundraisers's Fee to Support a Claim of Actual Fraud.

The Illinois Supreme Court did not question the sufficiency under state law of Illinois' complaint, including the allegation that Respondents' representations that donations would be used for charitable purposes were "false" because they kept 85 percent of all the money they raised. Instead, the court held that the First Amendment categorically precluded Illinois from relying on the percentage of donations kept by Respondents to prove the falsity of these representations. (App. 13.)[3] Establishing fraud in this fashion, the Illinois Supreme Court held, was "indistinguishable" from the statutory provisions struck down in *Schaumburg*, *Munson* and *Riley*, and therefore invalid. (App. 17.) Any reliance on Respondents' 85 percent fundraising fee to prove they committed fraud, the court concluded, constitutes "an attempt to regulate the defendants' ability to engage in a protected activity based upon a percentage-rate limitation" and incorrectly "presume[s]

[3] Although the concluding paragraph of the court's opinion stated that Illinois' complaint "does not state a cause of action for fraud" (App. 17), the only flaw it identifies is a violation of the First Amendment (*id.* at 5-17).

that there is a nexus between high solicitation costs and fraud." (App. 13, 17.) Neither statement is correct.[4]

By pursuing a claim of *actual fraud* against Respondents, Illinois is not attempting to regulate the "reasonableness" of their fee. The complaint alleges that Respondents committed fraud when they told the public how their donations would be used. Whether Respondents *actually* committed fraud depends on what the public reasonably understood by Respondents' representations, whether that was true, and whether Respondents intended to deceive them—not on whether Respondents were inefficient fundraisers or lacked legitimate reasons for having high solicitation costs.[5]

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[4] Although the Illinois Supreme Court did not explicitly embrace Respondents' argument that the First Amendment categorically protected them from any fraud liability unless they made a positive misstatement of fact that is entirely false (*i.e.*, one that did not rely on any intended inference or selective disclosure to create a misleading impression), that is the practical effect of the decision, even though it finds no support in this Court's precedents. *See Riley*, 487 U.S. at 800 ("the State may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on *false pretenses or* by making false statements") (emphasis added); *see also Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17-20 and n.7 (1990) (rejecting categorical First Amendment immunity from defamation liability for "anything that might be labeled 'opinion'" and noting that "the issue of falsity relates to the defamatory facts *implied* by a statement") (emphasis added, original emphasis omitted); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516-17 (1991); *Donaldson v. Read Magazine, Inc.*, 333 U.S. at 189-91; *Schneider v. State*, 308 U.S. at 164.

[5] Likewise, because the principal inquiry in this case is whether the *public* was deceived by what Respondents told them about how their donations would be used, the fact that Respondents' contracts with VietNow expressly provided for Respondents to keep 85 percent of the money raised does not resolve the issue.

Nor does Illinois' allegation that Respondents' representations were false because they kept 85 percent of all donations impermissibly rely on any legal "presumption" of fraud. Illinois is not proceeding under any statute that declares solicitation costs above a certain percentage automatically or presumptively unlawful. The State is proceeding under the common law of fraud, as well as its generally applicable anti-fraud statutes, under which the plaintiff has the burden of proving all of the necessary elements. The fact that Respondents kept 85 percent of all donations did not create a legal "presumption" of fraud, but merely constituted evidence of fraud in light of their representations to the public that donations would be used to provide food and shelter for needy veterans. *See generally* 31A C.J.S. Evidence § 131.c (1996); *cf. Yates v. Evatt*, 500 U.S. 391, 402 n.7 (1991). *Schaumburg*, *Munson* and *Riley* therefore do not support, much less "compel," the barrier erected by the Illinois Supreme Court against the pursuit of a fraud claim against Respondents in this case.[6]

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[6] The Illinois Supreme Court also relied on misinterpretations of several statements by the Court concerning the relationship between high solicitation costs and fraud. Given the context of a facial challenge, which looks at both overinclusiveness and whether the statutory rule itself is otherwise valid, *see Munson*, 467 U.S. at 965 n.13; *see also New York v. Ferber*, 458 U.S. 747, 768 n.21 (1982) (citing, *inter alia*, Monaghan, Overbreadth, 1981 S. Ct. Rev. 1, 10-14), the Court's statement in *Munson* that the challenged statute was invalid "in all its applications" simply reflected a rejection of using solicitation costs above a fixed percentage as a proxy for actual fraud, not a rejection of the commonsense notion that high solicitation costs *may* be relevant to whether a particular fundraiser has committed fraud in a given case. *Riley's* description of the Court's "clear holding in *Munson* that there is no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent,"

(continued...)

There is also no validity to the Illinois Supreme Court's conclusion that Illinois is unconstitutionally "compelling" Respondents to disclose their fundraising fee (App. 15-16), for it was Respondents' *own* representation that donations would be used to feed and house needy veterans that makes the nondisclosure of their 85 percent fee deceptive under traditional fraud principles. *Cf. Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991) ("Minnesota law simply requires those making promises to keep them").

Finally, the Illinois Supreme Court also erred in holding that any uncertainty in determining on a case-by-case basis whether fraud has been committed in a particular situation renders the process for making such determinations itself unconstitutional. (App. 16.) Unlike the facial challenges raised in *Schaumburg*, *Munson* and *Riley*, the present case involves an "as applied" challenge to laws that do not specifically target charitable solicitations,[7] but instead contain "viewpoint-neutral" standards applicable to fraud generally. *See R.A.V. v. City of St. Paul*, 514 U.S. 335, 387 (1992); *cf. Cohen v. Cowles Media*, 501 U.S. at 669-71. In similar circumstances, the traditionally recognized means for deciding whether someone had a First Amendment right to engage in particular speech is a trial conducted *after* the speech occurs, and at which the relevant facts are determined by a judge or jury in accordance with established principles. *New York v. Ferber*, 458 U.S. 747, 767-78, 773-

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[6] (...continued)
487 U.S. at 793, likewise did not declare that high solicitation costs and fraud are mutually exclusive, but merely reiterated the invalidity of a statutory rule declaring that such costs *alone* establish fraud. *See also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).

[7] The only exception is the claim under the anti-fraud provisions of Illinois' Charitable Solicitation Act, 225 ILCS 460/15(b)(5) (2000).

74; *CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994) (Blackmun, Circuit Justice); *see also Florida Star v. B.J.F.*, 491 U.S. 524, 539 (1989); *cf. Broadrick v. Oklahoma*, 413 U.S. 601, 615-616 (1973); *Miller v. California*, 413 U.S. 15, 23-27 and n.5 (1973).

This does not mean there are no First Amendment concerns in a case alleging that a party soliciting charitable donations committed fraud. Such concerns can be adequately addressed, however, without *totally* foreclosing the pursuit of fraud claims against persons who misrepresent that donations will be used for specific charitable purposes. Certainly, less drastic means to accommodate such concerns include procedural protections commonly used in other First Amendment contexts, such as requiring the plaintiff to bear the burden of proof on all elements of the claim, *see Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986), or heightened appellate review, *see Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984).

In short, the Court's precedents hold that a State may not legislatively declare high fundraising expenses *per se* fraudulent, not that such expenses are *per se* irrelevant to whether actual fraud has occurred. The Illinois Supreme Court's confusion about this distinction, while supposedly faithful to these precedents, improperly reads the First Amendment as a broad license for persons soliciting charitable donations to defraud the public.

II. The Issue Presented Here Is of Great Practical and Constitutional Importance.

This Court should grant *certiorari* because the constitutional issue presented here is of substantial public importance. Charitable giving in this country exceeds $200 billion

each year,[8] with a substantial amount of that money generated by professional fundraisers.[9] And, unfortunately, abuses are only too common. *See* Note, *Developments in the Law, Nonprofit Corporations*, 105 Harv. L. Rev. 1578, 1635 (1992) ("Donor ire is aroused time and again by media exposés of solicitation campaigns in which a charity has received only five cents on the dollar").[10]

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[8] *See* U.S. General Accounting Office, *Tax-Exempt Organizations, Improvements Possible in Public, IRS, and State Oversight of Charities*, April 2002, at 1 (available at http://www.gao.gov/new.items/ d02526.pdf). This report surveys the regulatory framework for charitable organizations, as well as possible federal law reforms. *See also* American Association of Fundraising Counsel, *Giving USA, 2001* (summarized at http://www.aafrc.org/press3.html).

[9] For example, the New York Attorney General's publication *Pennies for Charity, Where Your Money Goes, Telemarketing by Professional Fund Raisers, December 2001* (available at http://www.oag.state.ny.us/charities/pennies01/penintro.html) reports that professional fundraisers generated almost $190 million in charitable contributions in New York in 2000; that more than $125 million of this amount was generated by fundraisers who turned over to charity less than 40 percent of what they raised (with the average in this group being about 18 percent); and that more than $70 million was collected by fundraisers who turned over to charity less than 20 percent of what they raised (with the average in this group being about 12 percent of the total raised). Similar reports are available at: http://caag.state.ca.us/charities/publications/cfrreport.pdf (California); http://www.ago.state.ma.us/charity/telrep01.pdf (Massachusetts); and http://www.ag.state.oh.us/charitab/char1999.pdf (Ohio).

[10] *See also* National Crime Prevention Council, *Preventing Charity Fraud*, 2002 (available at http://www.ncpc.org/publications/charfraud/charfraud.htm) (noting increased "concerns about fraudulent solicitation schemes" following September 11, 2001); Richard T. Penciak, *Charity Donors Get Taken*, N.Y. Daily News, June 2, 2002.

The issues raised in this case are also ones the Court specifically reserved in its prior decisions in *Schaumburg*, *Munson* and *Riley*. The analysis in those cases, which was addressed to facial challenges to statutory schemes that applied rigid rules in an attempt to regulate the "reasonableness" of fundraising expenditures, does not answer the entirely different question presented here, where the focus is on whether, and in what manner, common law fraud principles must be modified to accommodate the First Amendment in a particular factual situation. Nonetheless, in the wake of those decisions States have been unsure how they may proceed, consistent with the First Amendment, to deal effectively with the serious problem of fraud committed by persons soliciting charitable donations.[11]

The Illinois Supreme Court's decision in this case dramatically illustrates the undesirable consequences of this uncertainty. Based on its misreading of *Schaumburg*, *Munson* and *Riley*, which rejected attempts to fight charitable solicitation fraud with sweeping legislative generalizations,

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[11] This concern has also received significant scholarly commentary. *See, e.g.*, Stephen H. Block, Note, *The Post-Riley Era: An Analysis of First Amendment Protection of Charitable Fundraising*, 10 Cardozo Arts & Ent. L.J. 101, 102 (1991) (observing that a "by-product of [the Court's decisions in *Schaumburg*, *Munson* and *Riley*] is the near inability of States to regulate fundraising effectively"); Note, *Developments in the Law, Nonprofit Corporations*, *supra* at 14, pp. 1634-35 ("The increased technological and organizational sophistication of modern charities, coupled with the appearance of extremely profitable professional solicitation firms, has created opportunities for sharp practice beyond the traditional evils of solicitation fraud and small-scale confidence games"); Errol Copilevitz, *The Historical Role of the First Amendment in Charitable Appeals*, 27 Stetson L. Rev. 457, 471 (1997) ("In the decade that has passed since the *Riley* decision, the Supreme Court has not been called upon to rule on any other case involving the fundraising process").

the Illinois Supreme Court has now rendered largely useless the tool that this Court repeatedly said may validly be used to accomplish this objective, namely vigorous enforcement of a State's generally applicable anti-fraud laws. The inevitable result of this misguided decision will be not only financial injury to the public at large, but also a tarnishing of the reputation of charities generally, thereby damaging their efforts to generate donations that *are* used for charitable purposes.[12]

Further, by confusing claims of actual fraud under generally applicable laws with rigid statutory restrictions specifically directed at charitable solicitations, the Illinois Supreme Court has given the First Amendment a meaning that logically knows no limits. Under that court's rationale, a State could not pursue a fraud claim against a professional fundraiser who solicits donations by representing that they will be used to feed starving children but keeps 99 percent of all the money he raises.[13] Indeed, contrary to the Court's warning about lumping together legitimate fundraisers with "organizations . . . that in fact are using the charitable label as a cloak for profitmaking," *Schaumburg*, 444 U.S. at 636-37, the Illinois Supreme Court's reasoning would immunize a fundraiser from any fraud liability for representing that donations will be used for such charitable purposes as long as it includes in each communication some token statement that there are millions of starving children

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[12] See GAO Report, *supra* n.8 at 1 ("Although the common belief is that the vast majority of charities strive to meet their charitable purpose, if a few charities abuse the public trust, the support given to the charitable community can be undercut").

[13] In fact, at oral argument before the Illinois Supreme Court, Respondents' counsel specifically stated that, in their view, the First Amendment gives them the right to solicit contributions as they do now even if they keep 99 percent of all the money donated.

who deserve a better chance in life. *Cf. Miller v. California*, 413 U.S. at 25 n.7.

The Illinois Supreme Court's misunderstanding of the First Amendment, based on its failure to appreciate the distinction between actual fraud and statutory generalizations that substitute isolated factors for proof of all the elements of fraud, should not be permitted to stand. This case presents an appropriate vehicle for the Court to provide urgently needed guidance on this issue of great public importance.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

Docket No. 89738–Agenda 37–May 2001.

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois, Appellant, v. TELEMARKETING ASSOCIATES, INC., *et al.*, Appellees.

Opinion filed November 21, 2001.

JUSTICE McMORROW delivered the opinion of the court:

In an amended complaint, the Attorney General, representing the people of this state, alleged that Telemarketing Associates, Inc., and Armet, Inc., corporations which operate as professional fund-raising services, and their director-owner, Richard Troia (collectively, the defendants), committed fraud and breached their fiduciary duty. The charged offenses were premised on the fact that defendants retained 85% of charitable funds collected on behalf of a charity, VietNow National Headquarters (VietNow), and, when soliciting, failed to inform donors that only 15% of their contribution would be distributed to the charity. The circuit court dismissed the complaint, finding that no cause of action had been stated under the facts alleged. The appellate court affirmed. 313 Ill. App. 3d 559. We granted the Attorney General's petition for leave to appeal (see 177 Ill. 2d R. 315) and now affirm the judgment of the appellate court.

BACKGROUND

The circuit court dismissed the Attorney General's amended complaint after defendants brought a motion to dismiss pursuant to section 2–615 of the Code of Civil Procedure (735 ILCS 5/2–615 (West 1998)). A motion to dismiss brought under section 2–615 admits all well-pled facts in the plaintiff's complaint. *Connick v. Suzuki Motor*

Co., 174 Ill. 2d 482, 490 (1996). Consequently, the following facts, taken from the Attorney General's complaint, are accepted as true.

Telemarketing Associates, Inc. (Telemarketing), and Armet, Inc. (Armet), are professional, for-profit fund-raising corporations which are wholly owned and controlled by Richard Troia. In accord with contracts negotiated with VietNow, an Illinois-based, not-for-profit corporation registered as an Illinois charitable trust, Telemarketing and Armet solicited funds on behalf of VietNow beginning in July 1987 and continuing into 1996. Pursuant to its contracts with VietNow, Telemarketing retained 85% of the gross collections in the State of Illinois "as its total compensation for all efforts and costs associated with the Marketing Program." Armet, through Troia, brokered fund-raising contracts between VietNow and various out-of-state, third-party solicitors. Pursuant to these contracts, VietNow received 10% of the gross receipts for out-of-state solicitations, while Armet, as the broker, received between 10% and 20% of these gross receipts.

Annual financial reports submitted to the Attorney General, as required by law (see 225 ILCS 460/4 (West 1998)), show that, from July 1987 until the end of 1995, defendants' fund-raising efforts on behalf of VietNow resulted in collection of $7,127,851. Of that amount, $6,073,887 was retained by defendants, netting VietNow $1,053,964, an amount just under 15% of the gross receipts.

VietNow does not complain that it did not receive the amounts for which it contracted, and there is no suggestion that defendants have not fully complied with the terms of their contracts. Further, VietNow has never expressed dissatisfaction with the fund-raising services provided by defendants and there is no allegation that defendants made affirmative misstatements to potential donors.

In an initial complaint filed on May 30, 1991, the Attorney General charged defendants with common law fraud and breach of their duty as fiduciaries of charitable assets. The complaint alleged that defendants, when making telephone solicitations on behalf of VietNow, represented that funds donated would go to further VietNow's charitable purpose. However, according to the Attorney General, because the fees charged by defendants for conducting solicitation were "excessive in amount and an unreasonable use and waste of charitable assets," and because defendants did not advise donors that only 15% of the funds raised would be turned over to VietNow, defendants' solicitations were "knowingly deceptive and materially false" and constituted fraud and a breach of their fiduciary duty. The Attorney General asked the circuit court to surcharge the defendants for assets found to have been misspent or misused and to enjoin defendants from further solicitation.

The Attorney General amended his complaint on June 25, 1996, by adding paragraphs which alleged that defendants had renewed their contracts with VietNow and, under the same terms as before, had continued to solicit funds on behalf of VietNow into 1996. It was further alleged that defendants' solicitations were in violation of section 15(b)(5) of the Solicitation for Charity Act (225 ILCS 460/15(b)(5) (West 1996)), which requires professional fund-raisers to identify "fully and accurately" the purpose for which funds are solicited. The Attorney General contended that defendants violated this provision because they materially misrepresented the purpose for which funds were being solicited by telling contributors, either explicitly or implicitly, that funds collected would be used to help veterans, and that these statements were inherently false and misleading in light of the high percentage of funds retained by the defendants.

The complaint further alleged that defendants, by failing to reveal to donors the percentage of the contribution which

would actually go to the charity, obtained money from donors under false pretenses. The same conduct was also alleged to constitute fraud under the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq.* (West 1996)) and under section 2 of the Uniform Deceptive Trade Practices Act (815 ILCS 510/2 (West 1996)). The complaint requested all available remedies and penalties authorized by section 9 of the Solicitation for Charity Act (225 ILCS 460/9 (West 1998)), including an injunction prohibiting defendants from conducting any future fund-raising services and forfeiture of their collected fees.

On September 6, 1996, defendants filed a section 2–615 motion to dismiss, arguing that charitable solicitations were protected speech under the first amendment. Defendants contended that, pursuant to *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 101 L. Ed. 2d 669, 108 S. Ct. 2667 (1988), a claim of fraud could not be maintained when the basis for the complaint was the percentage of proceeds retained by the fund-raisers and the failure to volunteer information concerning the amount of the proceeds that would go to the charity.

The trial court granted the motion to dismiss, but allowed the Attorney General to amend his complaint. On December 4, 1996, the Attorney General filed an amended complaint. In addition to the previous allegations, the Attorney General now alleged that defendants' retention of 85% of the gross proceeds, although contracted for and agreed to by VietNow, constituted fraud because defendants retained donor lists from year to year and, accordingly, should have incurred decreased administrative costs. Thus, it was alleged, defendants' retention of donor lists was evidence that defendants' fee was not justified by high administrative costs.

Defendants again filed a section 2–615 motion to dismiss, which was granted. The dismissal was affirmed on appeal.

313 Ill. App. 3d 559. This court granted the Attorney General's petition for leave to appeal. 177 Ill. 2d R. 315.

ANALYSIS

As noted above, the circuit court dismissed the Attorney General's complaint after defendants brought a section 2–615 motion to dismiss. A section 2–615 motion to dismiss challenges the legal sufficiency of the complaint. *Urbaitis v. Commonwealth Edison*, 143 Ill. 2d 458, 475 (1991). When reviewing a section 2–615 dismissal, the reviewing court must determine whether the allegations, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 490 (1996). Dismissal will be held proper only if it clearly appears that no set of facts can be proved under the pleadings which will entitle the plaintiff to recover. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 86-87 (1996). We review *de novo* a section 2–615 motion to dismiss. *Neade v. Portes*, 193 Ill. 2d 433, 439 (2000); *Abbasi v. Paraskevoulakos*, 187 Ill. 2d 386, 391 (1999).

The Attorney General argues that the circuit court erred in dismissing his amended complaint. He contends that the complaint is legally sufficient because it sets forth all of the elements necessary to state a valid cause of action for common law fraud. According to the Attorney General, it is a material misrepresentation for defendants to tell prospective donors that funds solicited on behalf of VietNow are to be used for a charitable purpose when, in fact, defendants retain 85% of the funds solicited and fail to reveal that fact to potential donors at the point of solicitation.

The Attorney General further contends that the alleged misrepresentations also constitute constructive fraud and breach of fiduciary duty because the defendants' retention

of 85% of the solicited proceeds, even if there was no intent to deceive, is "prejudicial to the public welfare" and a breach of the public's trust and confidence in charitable solicitation. The Attorney General admits that, ordinarily, donors anticipate that a certain amount of their contributions will be applied to "overhead." However, he claims that retention of 85% of donated funds goes well beyond any reasonable expectation of the public. As support for this position, the Attorney General has attached to his complaint the affidavits of 44 VietNow donors who assert that they would not have given money to the charity had they known how little of their donation was to be directed to the intended cause.

The Attorney General acknowledges the first amendment precedent relied upon by the circuit and appellate courts. Nevertheless, he claims the representations made by the defendants are actionable, notwithstanding the protections afforded charitable solicitations by the first amendment. We disagree.

We begin by examining the scope of first amendment guarantees afforded charitable solicitations. We use as guidance three decisions of the United States Supreme Court, *Village of Schaumburg v. Citizens For a Better Environment*, 444 U.S. 620, 63 L. Ed. 2d 73, 100 S. Ct. 826 (1980), *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 81 L. Ed. 2d 786, 104 S. Ct. 2839 (1984), and *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 101 L. Ed. 2d 669, 108 S. Ct. 2667 (1988).

In *Schaumburg*, a not-for-profit corporation properly registered as a charitable trust under Illinois law was denied a permit to solicit door-to-door by the Village of Schaumburg pursuant to a Village ordinance which required permit applicants to provide "[s]atisfactory proof that at least seventy-five percent of the proceeds of such solicitations will be used directly for the charitable purpose

of the organization." The charitable corporation sued the Village in federal district court, arguing that the ordinance violated the first and fourteenth amendments. The charity was granted summary judgment and the court of appeals affirmed.

On review, the United States Supreme Court, after examining prior authority, concluded that charitable appeals for funds fall within the protection of the first amendment because "solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and *** that without solicitation the flow of such information and advocacy would likely cease." *Schaumburg*, 444 U.S. at 632, 63 L. Ed. 2d at 84, 100 S. Ct. at 834. Accordingly, the Court found that the 75% limitation in the Village's ordinance was "a direct and substantial limitation on protected activity that cannot be sustained unless it serves a sufficiently strong, subordinating interest that the Village is entitled to protect." *Schaumburg*, 444 U.S. at 636, 63 L. Ed. 2d at 87, 100 S. Ct. at 836. The Court then rejected the Village's contention that its ordinance was justified because it was substantially related to the important governmental interests in preventing fraud, crime, and undue annoyance. Although the Court acknowledged that preventing fraud was indeed an important interest, the Court held that the ordinance was not narrowly drawn so as not to interfere with first amendment freedoms. *Schaumburg*, 444 U.S. at 636-37, 63 L. Ed. 2d at 87-88, 100 S. Ct. at 836. The ordinance only "peripherally promoted" the asserted governmental interest of protecting against fraud because, as the Court observed, costs incurred by charitable organizations conducting fund-raising campaigns can vary dramatically depending on a wide range of variables, some of which are beyond the control of the organization. *Schaumburg*, 444 U.S. at 637 n.10, 63 L. Ed. 2d at 87 n.10, 100 S. Ct. at 836 n.10. Thus, the Court

found there was no rational reason to conclude that a charity which uses more than 25% of the funds it collects on fund-raising, salaries, and overhead should automatically be labeled fraudulent. *Schaumburg*, 444 U.S. at 636-37, 63 L. Ed. 2d at 87, 100 S. Ct. at 836.

Four years after rendering its decision in *Schaumburg*, the Supreme Court was asked to consider the constitutionality of a Maryland statute which prohibited charitable organizations from paying or agreeing to pay "'as expenses in connection with any fund-raising activity a total amount in excess of 25 percent of the total gross income raised or received by reason of the fund-raising activity.'" *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 950 n.2, 81 L. Ed. 2d 786, 792 n.2, 104 S. Ct. 2839, 2843 n.2 (1984), quoting Md. Code Ann., Bus. Reg. §103A (1982). The statute contained a provision which authorized a waiver of the 25% limitation "'in those instances where the 25% limitation would effectively prevent a charitable organization from raising contributions.'"

Reaffirming its holding in *Schaumburg*, the *Munson* Court held that the Maryland percentage-based statute, like the ordinance in *Schaumburg*, substantially restricted a protected first amendment activity and that "the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech ***." *Munson*, 467 U.S. at 968, 81 L. Ed. 2d at 803, 104 S. Ct. at 2853. Percentage-based limitations, the Court reiterated, are insufficiently related to the governmental interest in preventing fraud. Furthermore, the constitutional deficiencies of the percentage-based limitation could not be remedied by the addition of a waiver provision which granted governmental authorities the discretion to dispense with the percentage limitation upon a showing of financial necessity. *Munson*, 467 U.S. at 962, 81 L. Ed. 2d at 799-800, 104 S. Ct. at 2850. The *Munson* Court explained:

"The flaw in the statute is not simply that it includes within its sweep some impermissible applications, but that in all its applications it operates on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud. That the statute in some of its applications actually prevents the misdirection of funds from the organization's purported charitable goal is little more than fortuitous. It is equally likely that the statute will restrict First Amendment activity that results in high costs but is itself a part of the charity's goal or that is simply attributable to the fact that the charity's cause proves to be unpopular. On the other hand, if an organization indulges in fraud, there is nothing in the percentage limitation that prevents it from misdirecting funds. In either event, the percentage limitation, though restricting solicitation costs, will have done nothing to prevent fraud." *Munson*, 467 U.S. at 966-67, 81 L. Ed. 2d at 802, 104 S. Ct. at 2852.

Despite *Munson*'s condemnation of percentage-based limitations on charitable solicitation, the Supreme Court was called upon just four years later to decide whether another percentage-based regulation, which had recently been added to the North Carolina Charitable Solicitations Act, suffered from the same constitutional deficiencies as the laws struck down in *Schaumburg* and *Munson*. See *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 101 L. Ed. 2d 669, 108 S. Ct. 2667 (1988). The North Carolina statute in *Riley* differed from the laws in *Schaumburg* and *Munson* in that it regulated professional for-profit fund-raisers rather than the charitable organizations themselves.

Responding to a study which showed that professional fund-raisers typically retained fees "well over 50% of the gross revenues collected in charitable solicitation drives," North Carolina enacted a statute which prohibited fund-

raisers from charging an "unreasonable" or "excessive" fee. *Riley*, 487 U.S. at 784, 101 L. Ed. 2d at 681, 108 S. Ct. at 2761. A three-tiered, percentage-based schedule was used to define the "reasonable fee" that a professional fund-raiser could charge. Specifically, a fund-raiser could charge up to 20% of its gross receipts without running afoul of the "reasonableness" requirement. A fund-raising fee between 20% and 35% of gross receipts, however, was presumptively unreasonable and excessive "if the party challenging the fund-raising fee also proves that the solicitation does not involve the dissemination of information, discussion, or advocacy relating to public issues as directed by the person established for a charitable purpose which is to benefit from the solicitation." Finally, the statute provided that, if the fund-raising fee was 35% or more of the gross receipts, the fund-raiser would carry the burden of proving that the fee was "necessary." Necessity, according to the statute, could be proved by evidence (1) that the fee was required due to the dissemination of information, discussion or advocacy for the charitable purpose, or (2) that the charity's ability to solicit would otherwise be "significantly diminished." The statute also required professional fund-raisers to disclose to potential donors, at the point of solicitation, the "average percentage of gross receipts actually turned over to charities by the fundraiser for all charitable solicitations conducted in North Carolina within the previous 12 months." *Riley*, 487 U.S. at 786, 101 L. Ed. 2d at 682, 108 S. Ct. at 2672.

After close examination of the statute, the *Riley* Court ruled that the percentage-based definition of an "unreasonable" fee could not pass constitutional muster because "using percentages to decide the legality of the fundraiser's fee is not narrowly tailored to the State's interest in preventing fraud." *Riley*, 487 U.S. at 789, 101 L. Ed. 2d at 684, 108 S. Ct. at 2673. The Court explained that the statute's defect was that it defined an "unreasonable" and "excessive"

fee according to the percentage of total revenues collected, "[d]espite our clear holding in *Munson* that there is no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent." *Riley*, 487 U.S. at 793, 101 L. Ed. 2d at 687, 108 S. Ct. at 2675.

Moreover, the Court found the North Carolina statute suffered from a "more fundament flaw" than the one in *Munson*—it placed fund-raisers at risk of having to rebut the presumption of unreasonableness, case by case, based on nothing more than "a loose inference that the fee might be too high." *Riley*, 487 U.S. at 793, 101 L. Ed. 2d at 687, 108 S. Ct. at 2676. The Court found it constitutionally unacceptable for fund-raisers to have to wait until "reasonable" fees were "judicially defined over the years." *Riley*, 487 U.S. at 793, 101 L. Ed. 2d at 687, 108 S. Ct. at 2676. In the interim, the Court held, fund-raisers would be unable to speak with any level of security and would run the risk of incurring litigation costs, as well as the possibility of a mistaken adverse ruling. *Riley*, 487 U.S. at 793-94, 101 L. Ed. 2d at 687, 108 S. Ct. at 2676. As a result, fund-raisers would be less inclined to contract with many charitable organizations, especially less popular ones, and the ability of charities to speak would be substantially diminished. *Riley*, 487 U.S. at 794, 101 L. Ed. 2d at 688, 108 S. Ct. at 2676.

The *Riley* Court also found constitutionally offensive the statutory provision which mandated fund-raisers to reveal to potential donors, at the point of solicitation, the amount of charitable proceeds turned over to a charity. The provision, the Court held, was a content-based regulation of protected speech which was unduly burdensome and not narrowly tailored. As the Court explained, a compelled disclosure requirement presumes, incorrectly, that a charity derives no benefit from funds collected but not disbursed to

it. Further, a disclosure requirement would "almost certainly hamper the legitimate efforts of professional fund-raisers to raise money for the charities they represent." *Riley*, 487 U.S. at 799, 101 L. Ed. 2d at 691, 108 S. Ct. at 2679.

Keeping in mind the holdings of *Schaumburg*, *Munson*, and *Riley*, we turn to the case at bar. The Attorney General contends that the present case is distinguishable from *Riley* and its predecessors because here the problem of fraud is being attacked, not through the application of "broad prophylactic" ordinances or statutes affecting all fund-raisers (see *Schaumburg*, 444 U.S. at 637, 63 L. Ed. 2d at 88, 100 S. Ct. at 836), but through the enforcement of the state's antifraud laws against specific defendants for "specific instances of deliberate deception." See *Riley*, 487 U.S. at 803, 101 L. Ed. 2d at 694, 108 S. Ct. at 2681 (Scalia, J., concurring). Thus, the Attorney General reasons, his complaint utilizes the "less intrusive" measures for attacking fraud suggested by the *Schaumburg* Court. *Schaumburg*, 444 U.S. at 637, 63 L. Ed. 2d at 88, 100 S. Ct. at 836. The Attorney General argues:

> "The complaint [at issue in this case] is the constitutional alternative to the prohibitive legislation at issue in *Schaumburg* and the burden-shifting legislation at issue in *Munson* and *Riley*. Here, the people seek to have the judicial process determine, under the specific facts of this distinct case, whether these particular defendants defrauded the public and violated their fiduciary duties as holders of charitable funds."

The Attorney General's argument suggests, in part, that the present action is a "less intrusive" means of combating fund-raising fraud because it is an instance of individual litigation, *i.e.*, a single complaint, and not a broad, regulatory statute. We reject this contention. When the Supreme Court spoke of the government's right to pursue "less intrusive" measures, it plainly meant that the government retained the right to regulate the conduct of fund-raisers in a manner which was "less intrusive" of their *constitutional rights*. The present action is not "less intrusive" within the meaning of the Supreme Court's holdings simply because it is an instance of individual litigation.

Thus, in this case, to determine whether the Attorney General's complaint is a "less intrusive" means of regulating defendants' speech and, hence, permitted by *Riley* and its predecessors, we must examine the allegations of the complaint and decide whether those allegations offend the first amendment principles set forth in the Supreme Court decisions. Stated otherwise, we must determine whether the Attorney General's complaint operates to limit defendants' ability to engage in solicitation—an activity protected by the first amendment—in a manner found constitutionally impermissible by the Supreme Court in *Schaumburg*, *Munson* and *Riley*. We conclude that it does.

The Attorney General's complaint seeks to enjoin defendants from conducting any future fund-raising activities based on allegations that defendants, when soliciting on behalf of VietNow, committed "fraud" because they made "false statements" concerning the purpose for which funds were being solicited. However, the statements made by defendants during solicitation are alleged to be "false" only because defendants retained 85% of the gross receipts and failed to disclose this information to donors. Thus, the Attorney General's complaint is, in essence, an attempt to regulate the defendants' ability to engage in a protected activity based upon a percentage-rate limitation. This is the same regulatory principle that was rejected in *Schaumburg*, *Munson* and *Riley*.

As the Supreme Court has pointed out, high solicitation costs, and a solicitor's high rate of retaining receipts, can be attributable to a number of factors. Certain types of fund-

raising campaigns, for example, include a wide range of activities that must be paid for. The present case illustrates this point. The Attorney General has attached defendants' contracts with VietNow to his complaint and made them a part of the pleadings. These contracts show that, in exchange for its fee, Telemarketing agreed to supply and pay the salaries of all marketing personnel, as well as pay all costs for an office and phones. In addition, Telemarketing agreed to be responsible for producing, publishing, editing and paying all costs for the annual publication of more than 2,000 copies of an advertising magazine which would "increase community awareness of [VietNow]." The contract required Telemarketing to conduct "an efficient and professional marketing program, promote goodwill on behalf of [VietNow], and enhance good public relations."

Contracts between VietNow and Armet provided that third-party professional fund-raisers would conduct an advertising and public awareness campaign in conjunction with the sale of advertizing in a quarterly publication. The quarterly publication would be produced by Armet. At least 30% of the quarterly publication was to be devoted to editorial content provided by VietNow. Armet also agreed to maintain a live, nationwide, toll-free telephone number which individuals could call to obtain information regarding VietNow.

Defendants in this case were contracted to perform a wide range of activities on behalf of VietNow, all of which were to be paid for out of the solicited funds. This example illustrates the principle that, because of the many different factors that may contribute to high solicitation costs, it is incorrect to assume, as a matter of law, that there is a nexus between high solicitation costs and fraud. See *Riley*, 487 U.S. at 793, 101 L. Ed. 2d at 687, 108 S. Ct. at 2675.

Further, and more fundamentally, it is incorrect to presume that there is a nexus between high solicitation costs

and fraud because, as the Supreme Court has explained, the percentage of proceeds turned over to a charity is not an accurate measure of the amount of funds used "for" a charitable purpose. See *Munson*, 467 U.S. at 967 n.16, 81 L. Ed. 2d at 802 n.16, 104 S. Ct. at 2852 n.16. Charities often reap nonmonetary benefits by having their message disbursed by the solicitation process. In fact, as the *Schaumburg* Court observed, the solicitation may be so intertwined with informative and persuasive speech that the solicitation itself is part of the charitable purpose. This point is aptly demonstrated in the case at bar. The defendants' contracts with VietNow required defendants to produce publications that "increased community awareness" about VietNow. Defendants were also directed to conduct their solicitations in a manner that would "promote goodwill" on behalf of VietNow. The fund-raising services defendant provided, therefore, were inextricably intertwined with the advancement of VietNow's philosophy and purpose. Moreover, because the solicitation process is so enmeshed with the charitable purpose, it is irrelevant whether or not defendants' administrative costs were reduced, as the Attorney General alleged, because defendants retained donor lists from year to year.

For similar reasons, fraud cannot be defined in such a way that it places on solicitors the affirmative duty to disclose to potential donors, at the point of solicitation, the net proceeds to be returned to the charity. Compelled disclosure, as the *Riley* Court held, is based on a presumption that the net proceeds returned to a charity are the only benefit that a charity derives from solicitation. This presumption is incorrect. As discussed above, often a large portion of the funds solicited are used "for a charitable purpose" although only a fraction of the proceeds are actually turned over to the charity. The net proceeds returned to a charity do not accurately reflect the amount of funds which go toward the charitable purpose because that figure

fails to take into consideration the charity's nonmonetary objectives, such as dissemination of information and advocacy, which are by-products of the solicitation that cannot be quantified. Consequently, any rule of law which burdens speech by requiring solicitors to make statistical disclosures, at the point of solicitation, is not narrowly tailored to the state's asserted interest of protecting the public from being misled about the way their charitable dollars are being spent. See *Riley*, 487 U.S. at 798-99, 101 L. Ed. 2d at 690-91, 108 S. Ct. at 2678-79.

We note, too, that professional fund-raisers who are telemarketers, as the defendants in this case, are particularly disadvantaged by a disclosure requirement. As the *Riley* Court observed, "if the potential donor is unhappy with the disclosed percentage, the fundraiser will not likely be given a chance to explain the figure; the disclosure will be the last words spoken as the donor *** hangs up the phone." *Riley*, 487 U.S. at 800, 101 L. Ed. 2d at 691, 108 S. Ct. at 2679.

Finally, we note that, although the Attorney General's complaint is aimed at regulating the fund-raising efforts of the defendants, this case has far-reaching implications for all fund-raisers. If a complaint such as the one at issue in this case was allowed to proceed, all fund-raisers in this state would have the burden of defending the reasonableness of their fees, on a case-by-case basis, whenever in the Attorney General's judgment the public was being deceived about the charitable nature of a fund-raising campaign because the fund-raiser's fee was too high. Fund-raisers, therefore, would be at a constant risk of incurring litigation costs, as well as civil and criminal penalties, which could produce a substantial chilling effect on protected speech, based on nothing more than a "loose inference that the fee might be too high." See *Riley*, 487 U.S. at 793, 101 L. Ed. 2d at 687, 108 S. Ct. at 2676. Such a procedure cannot be condoned.

In light of the foregoing, we conclude that the Attorney General's complaint suffers from the same "fundamental flaw" described by the Supreme Court in *Schaumburg*, *Munson* and *Riley*. The complaint incorrectly presumes that there is a nexus between high solicitation costs and fraud and attempts to regulate defendant's constitutionally protected solicitations on that basis. Contrary to the Attorney General's contentions, the complaint is not a "less intrusive" means of regulation but is, instead, indistinguishable from the regulatory measures struck down in *Schaumburg*, *Munson* and *Riley*. We conclude, therefore, that the Attorney General's complaint is prohibited under first amendment principles and was properly dismissed.

We are mindful of the opportunity for public misunderstanding and the potential for donor confusion which may be presented with fund-raising solicitations of the sort involved in the case at bar. However, the United States Supreme Court decisions in *Riley*, *Munson* and *Schaumburg* compel us to reach the decision we announce today.

CONCLUSION

The Attorney General's complaint is not legally sufficient. It does not state a cause of action for fraud or breach of fiduciary duty. Although the Attorney General purports to be charging defendants with specific instances of misrepresentation, his complaint is, at its core, a constitutionally impermissible percentage-based limitation on defendants' ability to engage in a protected activity. As such, the complaint is constitutionally deficient pursuant to *Schaumburg*, *Munson*, and *Riley*. Accordingly, we affirm the judgment of the appellate court, which affirmed the dismissal of the Attorney General's complaint.

Affirmed.

[Dated February 4, 2002]

Docket No. 89738–Agenda 37–May 2001.

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois, Appellant, v. TELEMARKETING ASSOCIATES, INC., *et al.*, Appellees.

The Supreme Court today DENIED the petition for rehearing in the above titled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on February 15, 2002.

SIXTH DIVISION
MAY 19, 2000

No. 1-99-0038	)	
	)	
PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,	)	Appeal from the Circuit Court of Cook County
	)	
Plaintiff-Appellant,	)	
v.	)	No. 91 CH 4926
	)	
TELEMARKETING ASSOCIATES, INC., an Illinois business corporation, ARMET INC., an Illinois corporation, and RICHARD TROIA, individually and as an officer, director and fiduciary of TELEMARKETING ASSOCIATES, INC. and ARMET, INC.,	)	The Honorable THOMAS A. HETT, Judge Presiding.
	)	
Defendants-Appellees.	)	

PRESIDING JUSTICE ZWICK delivered the opinion of the court:

The Attorney General filed an Amended Complaint charging the defendants-appellees with common law fraud and breach of fiduciary duty. The amended complaint alleged that the defendants-appellees are professional fund raisers for charity who, over an eight year period, consistently retained more than 85% of the proceeds of their solicitations on behalf of an Illinois-based charity, VietNow Memorial Headquarters (hereinafter "VietNow"). The complaint alleged that defendant-appellees made solicitations on behalf of VietNow without informing prospective donors that only 15 cents out of every dollar they contributed would be made available for charitable purposes—while the balance would be kept by the fund raisers. The trial court

granted defendants' motion to dismiss the complaint pursuant to section 2-615 of the Code of Civil Procedure. 735 ILCS 5/2-615 (West 1996).

The Attorney General raises the following issues for our review: (1) whether the allegations of the complaint plead a cause of action for common-law-fraud-based misrepresentation, breach of fiduciary duty, constructive fraud and/or for imposition of a constructive trust; (2) whether the First Amendment's prohibition against "forcing speech" bars the causes of action alleged; and (3) whether the First Amendment bars the claims alleged despite the fact that they are "straightforward" and based upon "content-neutral principles of law."

The original complaint in this case alleges that Telemarketing Associates, Inc. (Telemarketing) and Armet Inc. (Armet) are companies which provide professional fund-raising services for charitable organizations. Defendant-Appellee Richard Troia is the owner and an officer and director of these companies (collectively, the fund-raisers). Telemarketing has entered into contracts with a charitable organization, Vietnow, which provide that Telemarketing is to receive approximately 85% of the funds it collects for its professional efforts for Vietnow in Illinois. In addition, Armet has contracts under which it retains third party solicitors to raise money for Vietnow outside of Illinois. Under these contracts, the outside solicitors receive 70%-80% of the proceeds raised, while Armet receives 10-20% of the proceeds for its services.

There is no dispute that the fund-raisers have honored their contracts with Vietnow. The Attorney General makes no claim that Vietnow is dissatisfied with the fund-raisers' professional services. Similarly, the Attorney General makes no allegation that the fund-raisers have affirmatively misstated any information to any donor. The Attorney General instead alleges that the fund-raisers fraudulently concealed material information by not affirmatively volunteering their fee arrangement with the donors. By so acting, the complaint claims the fund-raisers violated the Charitable Solicitation Act, 225 ILCS 460/1 et seq. (West 1998) (the Solicitation Act), the Consumer Fraud and Deceptive Practices Act, 815 ILCS 501/1 (West 1998), and the Uniform Deceptive Trade Practices Act, 815 ILCS 510/2 (West 1998), and breached their fiduciary duty by engaging in fraudulent concealment. The Attorney General also complained that Armet violated the Solicitation Act by failing to register as a professional fund-raiser with the Attorney General or ensure that the outside professionals it hired had registered.

The complaint sought broad relief against the fund-raisers, including barring them from fundraising in Illinois for five years, forfeiture of their compensation, liability for both compensatory and punitive damages and a requirement that they pay the Attorney General for the costs of investigation and suit.

In dismissing the complaint, the trial court found that the United States Supreme Court's opinion in *Riley v. National Federation of the Blind*, 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988), established unequivocally that charitable solicitation by professional fund-raisers is protected speech entitled to full First Amendment protection and that a state may not punish a fund-raiser for earning a high fee or treat as fraud the fund-raiser's failure to affirmatively explain its fee arrangement to prospective donors. The court, however, allowed the count alleging non-registration by Armet to stand.

The Attorney General then filed certain amendments to the complaint, adding additional allegations but continuing to assert the earlier complaint in its entirety. The crux of the Attorney General's amended complaint continued to be that the fund-raisers had earned an excessive fee and

failed to disclose this to Vietnow's donors. The court again granted dismissal of the complaint with the exception of the non-registration claim against Armet.

On December 1, 1998, the Attorney General voluntarily dismissed the non-registration claim and the court entered an agreed order in favor of the fund-raisers on all claims. The Attorney General then filed this appeal challenging the dismissal of the fraud-based claims directed at the fund-raisers' fees.

Initially, we observe that a section 2-615 motion to dismiss challenges only the legal sufficiency of a complaint and alleges only defects on the face of the complaint. *Vernon v. Schuster*, 179 Ill. 2d 338, 344, 688 N.E.2d 1172 (1997). The critical inquiry in deciding upon a section 2-615 motion to dismiss is whether the allegations of the complaint, when considered in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. *Vernon*, 179 Ill. 2d at 344, citing *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 86-87, 672 N.E.2d 1207 (1996), and *Urbaitis v. Commonwealth Edison*, 143 Ill. 2d 458, 475, 575 N.E.2d 548 (1991). A cause of action will not be dismissed on the pleadings unless it clearly appears that the plaintiff cannot prove any set of facts that will entitle it to relief. *Vernon*, 179 Ill. 2d at 344, citing *Gouge v. Central Illinois Public Service Co.*, 144 Ill. 2d 535, 542, 582 N.E.2d 108 (1991). Accordingly, in reviewing the circuit court's ruling on defendants' section 2-615 motion to dismiss, we apply a de novo standard of review. *Doe v. McKay*, 183 Ill. 2d 272, 274, 700 N.E.2d (1998).

The circuit court correctly found that the Attorney General's amended complaint infringes upon the fund-raisers' constitutional rights. The United States Supreme Court has repeatedly held that solicitation activity on behalf of a charity is a form of free speech protected by the First

Amendment to the United States Constitution. In *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980), the Court struck down on First and Fourteenth Amendment grounds an ordinance which prohibited on-street and door-to-door solicitations for contributions by any charitable organization not using at least 75% of its receipts for charitable purposes. In reaching its decision the Court emphasized that:

> "Prior authorities *** clearly establish that charitable appeals for funds, on the street or door-to-door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment." *Schaumburg*, 444 U.S. at 632.

The Supreme Court and numerous lower courts have repeatedly affirmed the broad scope of First Amendment protections accorded charitable solicitations. See, *e.g.*, *United States v. Kokinda*, 497 U.S. 720, 725, 110 S. Ct. 3115, 111 L. Ed. 2d 571 (1990) ("Solicitation is a recognized form of speech protected by the First Amendment"); *Meyer v. Grant*, 486 U.S. 414, 422 n.5 (1988) ("[T]he solicitation of charitable contributions often involves speech protected by the First Amendment and *** any attempt to regulate solicitation would necessarily infringe that speech"); *Gaudiva Vaishnava Society v. City of San Francisco*, 952 F.2d 1059, 1063 (9th Cir. 1991) ("The Supreme Court has held that fundraising for charitable organizations is fully protected speech"); *Indiana Voluntary Fireman's Ass'n, Inc. v. Pearson*, 700 F. Supp. 421, 435 (S.D. Ind. 1988) (Charitable solicitation is "entitled to the entire panoply of protections afforded by the first amendment").

The Supreme Court has held that these constitutional rights fully apply even where charitable solicitation is done

by paid professionals. *Schaumburg*, 444 U.S. at 632. As the Court noted in *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 101 L. Ed. 2d 669, 108 S. Ct. 2667 (1988):

> "It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Riley*, U.S. at 801, citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964).

Riley stressed that a "fundraiser has an independent First Amendment interest in the speech, even though payment is received." *Riley*, 487 U.S. at 794, n.8. See also *Indiana Voluntary Fireman's Association*, 700 F. Supp. at 437 ("The protected speech overtones of such solicitations are not altered by the fact that the solicitor is a paid professional").

Government action which would infringe upon such speech is subject to strict scrutiny and may only restrict free speech where the restriction is precisely tailored to further a compelling state interest. See *Riley*, 487 U.S. at 799-800; *Secretary of State of Maryland v. Joseph A. Munson Co.*, 467 U.S. 947, 967-68, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984); *Schaumburg*, 444 U.S. at 636. The Attorney General appears to suggest that the mere fact that the fund-raisers' fees are high gives it a compelling interest to pursue its case, yet a similar argument was made in *Schaumburg* where the Village of Schaumburg claimed that more than 60% of the funds collected by the respondent, Citizens for a Better Government, were spent for the benefit of employees and not for a charitable purpose. Similarly, in *Munson*, the Court struck down a Maryland statute which forbade contracts between charities and professional fund-raisers if they provided that the fund-raiser would retain more than 25% of the money collected. Again, the Court rejected that the state's interest in preventing fraud could justify such a restriction, stating:

> "[T]here is no necessary connection between fraud and high solicitation and administrative costs. A number of other factors may result in high costs; the most important of these is that charities often are combining solicitation with dissemination of information, discussion, and advocacy of public issues, an activity clearly protected by the First Amendment." *Munson*, 467 U.S. at 961.

The Court called the statute at issue in *Munson* "fundamentally mistaken" in its premise that high solicitation fees could ever be an accurate measure of fraud. *Munson*, 467 U.S. at 966. The Court also explained that focusing on the percentage of a donation received by a fund-raiser is not narrowly tailored to the goal of preventing fraud, as the First Amendment requires:

> "That the statute in some of its applications actually prevents the misdirection of funds from the organization's purported charitable goal is little more than fortuitous. It is equally likely that the statute will restrict First Amendment activity that results in high costs but is in itself a part of the charity's goal or that is simply attributable to the fact that the charity's cause proves to be unpopular. On the other hand, if an organization indulges in fraud, there is nothing in the percentage limitation that prevents it from misdirecting funds. In either event, the percentage limitation, through restricting solicitation costs, will have done nothing to prevent fraud." *Munson*, 467 U.S. at 966-67.

The *Munson* decision specially rejected the argument raised by the Attorney General that a fund-raiser's receipt of high fees means that a solicitation does not serve a charitable purpose and makes the request for a donation a form of fraud. The dissent in *Munson* made the same argument, which the majority rejected:

"[T]he dissent *** 'simply misses the point' when it urges that there is an element of 'fraud' in a professional fundraiser's soliciting money for a charity if a high proportion of those funds are expended in fundraising. [Citation.] The point of the *Schaumburg* Court's conclusion that the percentage limitation was not an accurate measure of fraud was that the charity's 'purpose' may include public education. It is no more fraudulent for a charity to pay a professional fundraiser to engage in legitimate public educational activity than it is for the charity to engage in that activity itself. And concerns about unscrupulous fundraisers, like concerns about fraudulent charities, can and are accommodated directly, through disclosure and registration requirements and penalties for fraudulent conduct." *Munson*, 467 U.S. at 967-68 n.16.

The Court in *Riley* subsequently emphasized its holding that a fund-raiser cannot be prosecuted for fraudulent conduct merely on the fact that he or she charges a high fee. There, the Supreme Court examined the constitutionality of a North Carolina statute that defined the reasonable fee that a professional fund-raiser may charge according to a three-tiered schedule. Under that schedule, a fee of up to 20% of receipts collected was deemed reasonable. A fee of between 20% and 30% was deemed unreasonable upon a showing that the solicitation at issue did not involve the dissemination of information or advocacy relating to public issues as directed by the charity. A fee exceeding 35% was deemed unreasonable but the fund-raiser was allowed to rebut that presumption by a showing that the fee was necessary. *Riley*, 487 U.S. at 784-86. The statute also required professional fund-raisers to orally disclose to potential donors before an appeal for funds the percentage of charitable contributions collected during the previous 12 months that were actually turned over to the charity. 487 U.S. at 786.

The Court held that the state's interest in preventing fraud could not support the restrictions imposed by the statute:

> "Our prior cases teach that the solicitation of charitable contributions is protected speech, and that using percentages to decide the legality of the fundraiser's fee is not narrowly tailored to the State's interest in preventing fraud." *Riley*, 487 U.S. at 789.

The court repeated that "there is no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent ***." *Riley*, 487 U.S. at 793. Although the Attorney General argues vigorously that these statements were not meant to apply to common law actions or those statutory claims based upon common law principles, the same concerns which caused the Court to reject the statute at issue in *Riley* applies with equal force to the cause of action alleged by the Attorney General. Nor do we agree with the Attorney General's argument that the Supreme Court meant only to prohibit "rigid across-the-board limitations" on fund-raising fees. Indeed, the threat to constitutionally protected speech is even greater in cases in which the Attorney General or other officials have free rein to decide which fund-raisers to target.

The Maryland statute at issue in *Munson* gave the Secretary of State of Maryland the discretion to grant a waiver of the statute "whenever necessary." *Munson*, 467 U.S. at 964 n.12. The Secretary of State argued that this made the law constitutional because she had granted such waivers in an extremely liberal manner, and special care shown for the rights of advocacy groups. *Munson*, 467 U.S. at 964 n.12. The Supreme Court explained why giving state officials such discretion would pose an even greater threat to free speech:

> "[E]ven if the Secretary of State were correct [and] the waiver provision were broad enough to allow for exemptions 'whenever necessary,' we would find the statute only slightly less troubling. Our cases make clear that a statute that requires such a 'license' for the dissemination of ideas is inherently suspect. By placing discretion in the hands of an official to grant or deny a license, such a statute creates a threat of censorship that by its very existence chills free speech. [Citations.] Under the Secretary's interpretation, charities whose First Amendment rights are abridged by the fundraising limitations would simply have traded a direct prohibition on their activity for a licensing scheme that, if it is available to them at all, is available only at the unguided discretion of the Secretary of State." *Munson*, 467 U.S. at 964, n. 12.

See also *Riley*, U.S. 487 U.S. at 793-94 (rejecting a statutory presumption of unreasonableness which the fund-raiser is permitted to rebut).

The Attorney General claims that the fund-raisers committed fraud because they represented that monies donated would be used for Vietnow's charitable purposes but did not inform prospective donors that, pursuant to their contract with Vietnow, only 15% of the proceeds raised would be used by Vietnow. This was precisely the type of affirmative duty to speak which was struck down in *Riley*. The Supreme Court held that the provision compelled speech and was therefore a content-based restriction subject to exacting First Amendment scrutiny. *Riley*, 487 U.S. at 789. The Court found that the mandatory disclosure rule could not withstand such scrutiny because the proffered state interest was "not as weighty as the state asserts" and that "the means chosen to accomplish it are unduly burdensome and not narrowly tailored." *Riley*, 487 U.S. at 798. Other courts have reached the same conclusion. See, *e.g.*, *People v. French*, 762 P.2d 1369, 1375 (Colo. 1988); *State v. Events International, Inc.*, 528 A.2d 458, 461 (Me. 1987); *Indiana Voluntary Fireman's Assoc.*, 700 F. Supp. 421; *Telco Communications, Inc. v. Barry*, 731 F. Supp. 670 (D.N.J. 1990); *Kentucky State Police Professional Ass'n v. Gorman*, 870 F. Supp. 166 (E.D. Ky. 1994).

The Attorney General argues that the fund-raisers are fiduciaries to the public who transfers funds to them and, as fiduciaries, the fund-raisers should be held to a duty to fully inform the donors about the nature of their donation. See, *e.g.*, *Chicago Park District v. Kenroy, Inc.*, 78 Ill. 2d 555, 562, 402 N.E.2d 181 (1980); *Graham v. Mimms*, 111 Ill. App. 3d 751, 761, 444 N.E.2d 549 (1982). Yet the fund-raisers in the *Riley* case and the fund-raisers in the other solicitation cases which preceded it were also fiduciaries with respect to the money they solicited and collected. The cases cited by the Attorney General are neither First Amendment nor charitable solicitation cases. They are, therefore, plainly distinguishable.

In short, we find that the type of allegations made by the Attorney General's complaint violate the First Amendment and have been thoroughly discredited by the Supreme Court. Accordingly, for the foregoing reasons, the judgment of the circuit court dismissing the Attorney General's Amended Complaint is affirmed.

AFFIRMED.

CAMPBELL, J., and O'BRIEN, J., concur.

[Dated December 1, 1998]

**IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

No. 91 CH 4926

THE PEOPLE OF the STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois,

Plaintiff,

vs.

TELEMARKETING ASSOCIATES, INC., an Illinois business corporation; ARMET, INC., an Illinois corporation; and RICHARD TROIA, Individually and as an Officer, Director and Fiduciary of TELEMARKETING ASSOCIATES, INC., and ARMET, INC.,

Defendants.

AGREED JUDGMENT ORDER

THIS CAUSE coming before the Court on the motion of Plaintiff THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois, for voluntary dismissal of all remaining claims in Plaintiff's Complaint as amended to date, including specifically those statutory claims against Defendants RICHARD TROIA and ARMET INC. based on their alleged failure to register ARMET INC. with the Plaintiff in violation of the Charitable Trust and Illinois Solicitation For Charity Acts, all parties being before the Court by counsel, the Court being fully advised in the premises and being informed that the Defendants have agreed to the relief sought and concur in Plaintiff's Motion,

IT IS HEREBY ORDERED that all remaining claims in said Complaint, including specifically the claims based on the alleged failure of the Defendants to register ARMET INC. with the Plaintiff in violation of the Charitable Trust and Illinois Solicitation For Charity Act, be and the same are hereby dismissed.

December 1, 1998

ENTER:

/s/
JUDGE THOMAS A. HETT

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS

No. 91 CH 4926

PEOPLE OF THE STATE OF ILLINOIS *ex rel.*
JAMES E. RYAN, Attorney General,

Plaintiff,

v.

TELEMARKETING ASSOCIATES, INC., et al.,

Defendants.

ORDER

Coming upon the Plaintiff's Motion to Vacate Order and to Reconsider, the parties appearing and the court being advised in the premises, the court stating that the count as to statutory violation having not yet been dismissed or disposed of, that the matter is still pending on that count and being otherwise advised in the premises:

IT IS ORDERED:

A) The request for 304(a) language is denied;

B) The Motion to Vacate and Reconsider is denied for reasons stated on the record.

7/24, 1997

ENTER:

/s/
JUDGE THOMAS P. DURKIN

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS

No. 91 CH 4926

PEOPLE OF THE STATE OF ILLINOIS *ex rel.*
JAMES E. RYAN, Attorney General,

Plaintiff,

v.

TELEMARKETING ASSOCIATES, INC., et al.,

Defendants.

ORDER

Coming upon Defendants' Motion to Dismiss under Section 2-615, the Parties having briefed the motion, the Parties having appeared, the court hearing argument and the court being advised in the premises:

It is Ordered for the reasons stated on the record the Plaintiff's Amended Complaint as to the issues of fraud is dismissed.

5/29, 1997

ENTER:

/s/
JUDGE THOMAS P. DURKIN

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS

No. 91 CH 4926

PEOPLE OF THE STATE OF ILLINOIS *ex rel.*
JAMES E. RYAN, Attorney General,

Plaintiff,

v.

TELEMARKETING ASSOCIATES, INC.,
RICHARD TROIA, ARMET, INC.,

Defendants.

ORDER

This case having come before the Court on Defendants' motion to dismiss pursuant to § 2-615 of the Illinois Civil Code, 735 ILCS 5/2-615, and the matter having been briefed by both parties and the Court having heard oral argument in the premises.

IT IS HEREBY ORDERED:

For the reasons set forth by the Court in open court:

1) Defendants' Motion is granted insofar as it relates to the fraud claims and allegations made by Plaintiff;

2) Defendants' motion is denied insofar as it relates to the statutory requirement in 245 ILCS 460/6 as to licensing;

3) Plaintiff is given leave to amend, if needed.

11/4, 1996

ENTER:

/s/
JUDGE THOMAS P. DURKIN

Supreme Court, U.S.
FILED
SEP 30 '02
OFFICE OF THE CLERK

(19)

No. 01-1806

In the Supreme Court of the United States

THE PEOPLE OF THE STATE OF ILLINOIS
***ex rel.* JAMES E. RYAN, Attorney General of Illinois,**

Petitioner,

v.

TELEMARKETING ASSOCIATES, INC., an Illinois business corporation; ARMET INC., an Illinois corporation; and RICHARD TROIA, Individually and as an Officer, Director and Fiduciary of TELEMARKETING ASSOCIATES, INC.; and ARMET INC.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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44 pp

QUESTION PRESENTED FOR REVIEW

Did the Illinois Supreme Court correctly hold that the Illinois Attorney General's amended complaint failed to state a claim for fraud or breach of fiduciary duty because the First Amendment to the United States Constitution bars such a claim based solely upon allegations that professional fundraisers earned gross fees which the Illinois Attorney General considered excessive and their gross fees were not voluntarily disclosed to potential donors?

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STATUTES INVOLVED

The Illinois Attorney General's ("Attorney General") brief omits reference to the statutory provisions he raised in his Amended Complaint:

- Sections 9(c), 15(a) and 15(b)(5) of the Illinois Solicitation For Charity Act, 225 ILCS 460/9(c), 15(a), 15(b)(5)
- Sections 1 and 2 of the Illinois Consumer Fraud Act, 815 ILCS 505/1, 2
- Uniform Deceptive Trade Practices Act ("UDTPA"), 815 ILCS 510/2.

Also relevant is Section 18(c) of the Illinois Solicitation For Charity Act, 225 ILCS 460/18(c).[1]

[1] Pursuant to United States Supreme Court Rule 24(1)(f), these statutory provisions may be found at Appendix A.

STATEMENT OF THE CASE[2]

Respondents Telemarketing Associates, Inc. ("Telemarketing") and Armet Inc. ("Armet") are companies that provide professional fundraising services for charitable organizations. Respondent Richard Troia ("Mr. Troia") is the owner and an officer and director of these companies (collectively the "Fundraisers"). Telemarketing entered into arms-length contracts with an independent charitable organization, Vietnow National Headquarters, Inc. ("Vietnow"), an Illinois-based, not-for-profit corporation with charitable purposes. Vietnow, which was not a party to this suit, was organized in 1984 and is associated with an Illinois state chapter and 26 Illinois local chapters. Vietnow also operates as the national organization for several State organizations. (Amended Complaint ("AC") ¶8; R. Vol. I, C-4).[3] Vietnow's Articles of Incorporation show that its purposes include "to help increase community

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[2] Because the Circuit Court granted the Fundraisers' motion to dismiss, the Statement of Facts is based on the Attorney General's Amended Complaint which incorporated his original Complaint. A motion to dismiss under Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615, accepts all well-pled facts but not conclusions of law or factual conclusions which are unsupported by allegations of specific facts in a plaintiff's complaint. *Connick v. Suzuki Motor Co.*, 174 Ill.2d 482, 490, 675 N.E.2d 584 (1996). Nothing in this Statement of the Case should be treated as an admission by the Fundraisers. Citation to the record on appeal ("R") will be to the volume of the record ("Vol.") and the individual page at which the citation may be found ("C-__").

[3] The Attorney General incorporated and realleged his original Complaint, R. Vol. I, C-2-113, in his Amended Complaint. Therefore, paragraphs 1-47 of the Amended Complaint are actually citations set forth in the original Complaint. (R. Vol. I, C-2-14).

awareness of the problems and readjustments encountered by the Vietnam veteran and his family" and "to demonstrate to our community that Vietnam veterans are a vital resource." (AC Ex. A; R. Vol. I, C-17).

Telemarketing is registered as a professional fundraiser in Illinois and has filed financial information and reports. (AC ¶¶17, 22 & Ex. D; R. Vol. I, C-6, 8, 87-111). Beginning in 1987, Telemarketing entered into three separate contracts with Vietnow to act as a professional fundraiser and solicit charitable donations from the public on behalf of Vietnow. (AC ¶¶11, 49[4] & Exs. B, G; R. Vol. I, C-5, 21-28, 208, 214-18). In these contracts Vietnow expressly agreed that Telemarketing was to receive 85% of the gross receipts it collected from charitable solicitations on behalf of Vietnow in Illinois. (AC ¶¶11, 49, Exs. B, C, G; R. Vol. I, C-4-5, 23, 27, 216).

Regarding Armet, since 1989 Armet acted as the broker in obtaining third party professional fundraisers to conduct out-of-state fundraising for Vietnow. Under these contracts, the third party fundraisers were to receive 70-30% of the funds solicited, Armet was to receive 10-20% as the finder of these fundraisers and Vietnow was to receive the remaining 10%. (AC ¶12 & Ex. C; R. Vol. I, C-5, 29-67). The Fundraisers' relationship with Vietnow was solely contractual, professional and independent. The Attorney General made no allegation that the Fundraisers at any time had an ownership interest in Vietnow or played any role in manag-

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[4] In his Amendments to Complaint submitted December 4, 1996, R. Vol. II, C-319-26, the Attorney General renumbered what had been paragraphs 47A-47C and 67D-67O of his earlier Amendments to Complaint submitted June 25, 1996 as paragraphs 48-62 of the Amended Complaint. Paragraph 47B (R. Vol. I, C-208) therefore became paragraph 49 of the Amended Complaint.

ing or operating Vietnow. (AC Ex. A; R. Vol. I, C-17-20). As the Illinois Supreme Court found:

> Vietnow does not complain that it did not receive the amounts for which it contracted, and there is no suggestion that defendants have not fully complied with the terms of their contracts. Further, Vietnow has never expressed dissatisfaction with the fundraisers and *there is no allegation that defendants made affirmative misstatements to potential donors.*

198 Ill.2d at 348 (emphasis supplied).

Further, in his Amended Complaint, the Attorney General admitted that fundraising has genuine expenses and costs. (AC ¶32; R. Vol. I, C-11). He never has denied that potential donors knew that some fundraising costs would be associated with Vietnow's solicitation. In sum, the Attorney General sued the Fundraisers because he believed the contract fee arrangement they negotiated with Vietnow was "excessive."

In 1991 the Attorney General filed his original complaint which, in 1996, he amended (together the "Complaint"). In these pleadings, the Attorney General claimed that the Fundraisers violated the Solicitation For Charity Act, 225 ILCS 460/1 *et seq*. (the "Solicitation Act"), the Consumer Fraud And Deceptive Business Practices Act, 815 ILCS 505/1 (the "Consumer Fraud Act"), and the Uniform Deceptive Trade Practices Act, 815 ILCS 510/2 (the "UDTPA"), and breached their fiduciary duty and engaged in fraudulent concealment. The Attorney General also complained that Armet violated the Illinois Solicitation For Charity Act by failing to register as a professional fundraiser with the Attorney General or ensure that the outside professionals it hired had registered (the "Registration Claim").

The Attorney General sought harsh and sweeping relief against the Fundraisers, including an order barring the

Fundraisers from charitable fundrai ing in Illinois for five years, requiring that Mr. Troia and Telemarketing forfeit any compensation they have earned, holding each of the Fundraisers liable for both compensatory and punitive damages of more than $100,000 each, requiring the Fundraisers to provide an accounting, surcharging them for monies for which they cannot fully account or which are found to have been misspent or misused as well as for all proceeds, fees and salaries paid to persons and entities that the Attorney General claims should have been registered with the state prior to engaging in fundraising, and directing the Fundraisers to help pay the state's costs in investigating and suing them. (R. Vol. I, C-14-15, 212-213; R. Vol. II, C-325-26).

The Fundraisers moved to dismiss the Attorney General's Complaint because it violated their right of free speech protected by the First Amendment of the United States Constitution. U.S. CONST. amend. I. The Fundraisers' position was based upon this Court's decisions beginning with *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980) ("*Schaumburg*"), followed by *Secretary of State of Maryland v. Joseph A. Munson*, 467 U.S. 947 (1984) ("*Munson*"), and culminating in *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988) ("*Riley*") (collectively the "*Riley* Line of Authority"), that unequivocally stated that charitable solicitation by professional fundraisers is protected speech entitled to the fullest First Amendment protection and that a state may not punish a fundraiser for earning a high fee or treat as fraud the fundraiser's failure to affirmatively volunteer its fee arrangement to donors.

On November 4, 1996, based upon the *Riley* Line of Authority, the trial court dismissed the Attorney General's fraud and other claims directed at the Fundraisers' fees, upheld the Registration Claim and gave the Attorney General leave to amend his complaint. The Attorney General's

amendments added allegations but asserted the Complaint in its entirety (the "Amended Complaint"). The crux of the Amended Complaint remained that the Fundraisers earned a high fee under their contracts but failed to affirmatively disclose this—exactly what the *Riley* Line of Authority forbids. The Fundraisers again successfully moved to dismiss these claims. The Registration Claim remained. Subsequently, the Attorney General voluntarily dismissed the Registration Claim and the trial court entered an agreed judgment order in favor of the Fundraisers on all claims. The Attorney General appealed.

On May 19, 2000, the Appellate Court affirmed the trial court's dismissal of the Amended Complaint. *People v. Telemarketing Assoc.*, 313 Ill.App.3d 559, 729 N.E.2d 965 (1st Dist. 2000). On November 21, 2002, after granting the Attorney General's Petition for Leave to Appeal, the Illinois Supreme Court again affirmed the dismissal of the Amended Complaint on the grounds that it is prohibited under First Amendment principles. *People v. Telemarketing Assoc.*, 198 Ill.2d 345, 763 N.E.2d 289 (2001).

SUMMARY OF ARGUMENT

The Attorney General and *Amici Curiae* claim that if the Illinois Supreme Court's decision is affirmed, unscrupulous fundraisers will have a field day in Illinois and elsewhere and that the Attorney General and *amici* States will have no means of stopping their misconduct. The Attorney General's and *amici* States' position is absolutely incorrect. Rather, all that affirmance of the decision below means is that the Attorney General and Attorneys General in other states cannot take action against professional fundraisers in violation of the First Amendment as articulated by this Court's controlling authority. Specifically, as in this case, where the Fundraisers' conduct does not include *affirmative misrepresentations*, this conduct is protected by the First Amendment. As a result, the Illinois Supreme Court's decision does not create a constitutional issue of substantial public importance left unresolved by this court's prior decisions. To the contrary, although this Court has recognized that states may use their anti-fraud provisions "to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements," *Riley*, 487 U.S. at 800, the state must be able to allege a valid fraud claim. As the Illinois Supreme Court properly concluded, this was something the Attorney General could not do.

The Attorney General's claim that the First Amendment's protection of speech does not prohibit his Amended Complaint is erroneous. There is no dispute that the Fundraisers have taken as fees what their contracts with Vietnow expressly permit, Vietnow is a sophisticated, national independent charitable organization and Vietnow has not complained about the Fundraisers' fees or the quality of their services. To the contrary, Vietnow renewed the Fundraisers' contracts repeatedly over the years and since 1987 employed the Fundraisers to do solicitation on its behalf. While Vietnow has not complained, the Attorney General

would put the Fundraisers out of business, confiscate their earnings, fine them punitive and other damages and force them to pay for the State's own investigation and lawsuit based upon the Attorney General's arbitrary judgment that the fees earned under the Fundraisers' contracts are excessive and that the Fundraisers should have volunteered their fee arrangements to donors who did not ask for this information.

As the Illinois Supreme Court recognized, this is a textbook illustration of what this Court found was an unconstitutional invasion of a charitable fundraiser's First Amendment rights under the *Riley* Line of Authority which unequivocally holds that a fundraiser cannot be penalized for earning a high fee and may not be compelled by a state to affirmatively disclose this fee to potential donors.

The Attorney General similarly errs in claiming that the Illinois Supreme Court's decision misinterpreted the *Riley* Line of Authority. Rather, it is the Attorney General who engages in such a distortion. While the *Riley* Line of Authority allows a state to enforce its fraud laws against a charitable fundraiser who makes an actual misstatement, here there is no allegation of any false statement made by any of the Fundraisers. Likewise, the Illinois Supreme Court correctly recognized that requiring the Fundraisers to affirmatively volunteer their fee arrangement with potential donors cannot, consistent with this Court's First Amendment teachings, be the basis for a suit against the Fundraisers. 198 Ill.2d at 361-362.

Finally, the Attorney General's claim that the Amended Complaint states valid fraud claims is erroneous. While the Attorney General characterizes his Amended Complaint as alleging common law fraud, in fact it alleges statutory fraud based upon the Illinois Solicitation for Charity Act, 225 ILCS 460/1 *et seq.*, the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, and the

Uniform Deceptive Trade Practices Act, 815 ILCS 510/1. No matter what the characterization, as the Illinois Supreme Court correctly found, "fraud cannot be defined in such a way that it places on solicitors the affirmative duty to disclose to potential donors, at the point of solicitation, the net proceeds to be returned to the charity." 198 Ill.2d at 361.

While the Attorney General quotes the Illinois Supreme Court's observation that "this case has far-reaching implications for all fundraisers," 198 Ill.2d at 362, he distorts those implications. The Illinois Supreme Court's statement was directed toward the abrogation of the constitutional protections afforded to professional fundraisers if they could be severely punished by the Attorney General, based upon common law principles or statutory claims based upon common law principles, because, in his arbitrary opinion, the fundraiser earned too much. Specifically, the Illinois Supreme Court correctly observed that if the Amended Complaint is upheld, "all fund-raisers in this state would have the burden of defending the reasonableness of their fees, on a case-by-case basis, whenever in the Attorney General's judgment the public was being deceived about the charitable nature of a fund-raising campaign because the fundraiser's fee was too high." 198 Ill.2d at 362.

Contrary to the Attorney General's and *amici* States' claim, the Illinois Supreme Court's decision is not unprecedented nor inconsistent with this Court's precedent or Illinois law. To the contrary, the Illinois Supreme Court's decision properly interprets this Court's prior decisions and Illinois law. Accordingly, the Petition for a Writ of Certiorari should be denied.

ARGUMENT

I. THE ILLINOIS SUPREME COURT CORRECTLY HELD THAT THE ILLINOIS ATTORNEY GENERAL'S AMENDED COMPLAINT FAILED TO STATE A CLAIM FOR FRAUD OR BREACH OF FIDUCIARY DUTY BECAUSE THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION BARS SUCH A CLAIM BASED SOLELY UPON ALLEGATIONS THAT PROFESSIONAL FUNDRAISERS EARNED GROSS FEES WHICH THE ILLINOIS ATTORNEY GENERAL CONSIDERED EXCESSIVE AND THEIR GROSS FEES WERE NOT VOLUNTARILY DISCLOSED TO POTENTIAL DONORS.

A. The First Amendment Prohibits the Attorney General's Amended Complaint.

1. The Illinois Supreme Court Properly Applied Controlling Supreme Court Precedent in Finding the Attorney General's Action Infringed the Fundraisers' Free Speech Rights.

The Illinois Supreme Court correctly found that the Attorney General's Amended Complaint infringed upon the Fundraisers' constitutional rights. This Court repeatedly has held that solicitation activity on behalf of a charity is a form of free speech protected by the First Amendment to the United States Constitution. U.S. CONST. amend. I. In *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980), this Court struck down on First and Fourteenth Amendment grounds an ordinance which prohibited on-street and door-to-door solicitations for contributions by any charitable organization not using at least 75% of its receipts for charitable purposes. In reaching its decision this Court emphasized that:

> Prior authorities . . . clearly establish that charitable appeals for funds, on the street or door-to-door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment.

Id. at 632.

This Court repeatedly has affirmed the broad scope of First Amendment protection accorded charitable solicitation. *See e.g., United States v. Kokinda*, 497 U.S. 720, 725 (1990) ("Solicitation is a recognized form of speech protected by the First Amendment."); *Meyer v. Grant*, 486 U.S. 414, 422 n.5 (1988) ("[T]he solicitation of charitable contributions often involves speech protected by the First Amendment and . . . any attempt to regulate solicitation would necessarily infringe that speech.").

This Court has made it equally clear that these constitutional rights fully apply even where charitable solicitation is done by paid professionals. *Schaumburg*, 444 U.S. at 632. As this Court noted in *Riley*:

> It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.

487 U.S. 781, 801 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964)). *Riley* stressed that a "fundraiser has an independent First Amendment interest in the speech, even though payment is received." *Id.* at 794 n.8.

Government action that would impinge on such protected speech is subject to strict scrutiny and may restrict free speech only where the restriction is precisely tailored to further a compelling state interest. *See Riley*, 487 U.S. at 799-800; *Munson*, 467 U.S. 947, 967-68 (1984); *Schaumburg*, 444 U.S. 620, 636. As the Illinois Supreme Court correctly found, the Attorney General cannot meet these strict standards.

2. Preventing Fraud Cannot Justify a State's Restrictions on Fundraisers' Fees.

This Court has made it clear that preventing fraud cannot justify a state's restrictions on fundraisers' fees. Thus, in *Schaumburg*, 444 U.S. 620, the Village, similar to the Attorney General here, complained that more than 60% of the funds collected by the Respondent, Citizens for a Better Environment, were spent for the benefit of employees and not for charitable purposes. *Id.* at 626. The Village argued that this high fee showed that the Respondent was primarily devoted to raising funds for the benefit and salary of its employees and that its charitable purposes were negligible compared with its primary objective of raising funds. *Id.* The Village further argued that the Schaumburg ordinance was "intimately related to substantial governmental interest 'in protecting the public from fraud, crime and undue annoyance,'" with the prevention of fraud being the Village's principal justification. *Id.* at 636. This Court held that these proffered justifications were inadequate and that the Schaumburg ordinance could not "survive scrutiny under the First Amendment." *Id.*

Subsequently, in *Munson* this Court reaffirmed that a state's interest in preventing fraud could justify a restriction on fundraisers' fees. In *Munson*, this Court struck down a Maryland statute that forbade contracts between charities and professional fundraisers if they provided that the fundraiser would retain more than 25% of the money collected. In so doing, *Munson* broadly held that:

> *there is no necessary connection between fraud and high solicitation and administrative costs*. A number of other factors may result in high costs; the most important of these is that charities often are combining solicitation with dissemination of information, discussion, and advocacy of public issues,

> an activity clearly protected by the First Amendment . . . .

467 U.S. at 961 (emphasis added).

Munson stressed that it is unconstitutional for a state in any context to equate the earning of a high fee by a charitable solicitor with fraud:

> The flaw in this statute is not simply that it includes within its sweep some impermissible applications *but that in all its applications it operates on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud.*

467 U.S. at 966 (emphasis added). *Munson* explained that focusing on the percentage of a donation received by a fundraiser is not narrowly tailored to the goal of preventing fraud, as the First Amendment requires:

> That the statute in some of its applications actually prevents the misdirection of funds from the organization's purported charitable goal is little more than fortuitous. It is equally likely that the statute will restrict First Amendment activity that results in high costs but is itself a part of the charity's goal or that is simply attributable to the fact that the charity's cause proves to be unpopular. On the other hand, if an organization indulges in fraud, there is nothing in the percentage limitation that prevents it from misdirecting funds. In either event, the percentage limitation, through restricting solicitation costs, will have done nothing to prevent fraud.

Id. at 966-67.

Although the Attorney General acknowledges *Munson's* recognition that it is a "fundamentally mistaken premise that high solicitation costs are an accurate measure of

fraud," (AG Pet. at 7), he totally misunderstands *Munson's* implications for this suit.

As the Illinois Supreme Court emphasized, 198 Ill.2d at 354, *Munson* specifically rejected the argument raised by the Attorney General that a fundraiser's receipt of high fees means that a solicitation does not serve charitable purposes and makes the request for a donation a form of fraud. Although the *Munson* dissent similarly had argued there is an element of "fraud" if a high proportion of the funds raised by a professional fundraiser are used for fundraising, the majority appropriately found that this argument "simply misses the point." 467 U.S. at 967-68. By pursuing a fraud action on this same theory, the Attorney General likewise "misses the point."

Four years after *Munson*, in *Riley*, 487 U.S. 781, this Court again emphasized that states may not punish a fundraiser for earning a high fee. At issue in *Riley* was the constitutionality of a North Carolina statute that defined a professional fundraiser's reasonable fee according to a three-tiered schedule. Under that schedule, a fee of up to 20% of receipts collected was deemed reasonable. A fee between 20% and 30% was deemed unreasonable upon a showing that the solicitation at issue did not involve the dissemination of information or advocacy relating to public issues as directed by the charity. A fee exceeding 35% was deemed unreasonable but the fundraiser was allowed to rebut that presumption by a showing that the fee was necessary. *Id.* at 784-85. The statute also required that before an appeal for funds professional fundraisers orally disclose to potential donors the percentage of charitable contributions collected during the previous twelve months that were turned over to the charity. *Id.* at 786.

Riley held that the state's interest in preventing fraud could not support these restrictions:

> Our prior cases teach that the solicitation of charitable contributions is protected speech, and that *using percentages to decide the legality of the fundraiser's fee is not narrowly tailored to the State's interest in preventing fraud.*

487 U.S. at 789 (emphasis added). This Court repeated that "there is *no nexus* between the percentage of funds retained by the Fundraiser and the likelihood that the solicitation is fraudulent . . . ." *Id.* at 793 (emphasis added). These broad determinations plainly embrace a common law fraud action that attempts to draw such a nexus.

Riley noted that solicitations could serve charitable purposes even when, unlike here, these do not directly generate *any* fees for the charity:

> The State presumes that the charity derives no benefit from the funds collected but not turned over to it. Yet this is not necessarily so. For example, . . ., where the solicitation is combined with advocacy and dissemination of information, the charity reaps a substantial benefit from the act of solicitation itself. Thus, a sufficient portion of the fundraiser's "fee" may well go toward achieving the charity's objectives even though it is not remitted to the charity in cash.

487 U.S. at 798-99.

Notably, Vietnow, the charity for which the Fundraisers solicited money, has a goal of public education as part of its mission. Among its charitable purposes are to "help increase community awareness about the problems and readjustments encountered by the Vietnam veteran and his family" and "to demonstrate to the community that Vietnam veterans are a vital resource." (R. Vol. I, C-17-18). The Attorney General cannot and does not take issue with these goals. He does not deny that Vietnow could expend signifi-

cant funds to do such public education itself. As *Munson* shows, it is equally lawful for Vietnow to enter into contracts to pay sums to a professional solicitor to do such education on its behalf. The First Amendment does not allow a state official to interfere with this choice.

Riley emphasized that the First Amendment prohibits a state from interfering with a charity's determination of how best to take its message to the public. *Riley*, therefore, rejected that a percentage restriction paid to charitable solicitors could be justified on the ground that charitable organizations are economically unable to negotiate fair or reasonable contracts without governmental assistance. As this Court stated:

> [T]his regulation burdens speech, and must be considered accordingly. There is no reason to believe that charities have been thwarted in their attempts to speak or that they consider the contracts in which they enter to be anything less than equitable. Even if such a showing could be made, the state's solution stands in sharp conflict with the First Amendment's command that government regulation of speech must be measured in minimums, not maximums.
>
> The state's remaining justification—the paternalistic premise that charities' speech must be regulated for their own benefit—is equally unsound. The First Amendment mandates that we presume that speakers, not the government, know best what they want to say and how to say it.

487 U.S. at 790-91. Tellingly, here, there is no allegation that Vietnow made any complaint about the Fundraisers' fees. To the contrary, it renewed its fee arrangements with the Fundraisers in a series of successive contracts over a period of more than eight years.

3. The Attorney General's Amended Complaint Violates the First Amendment because It Improperly is Based Upon the Amount of the Fundraisers' Fees and Their Failure to Disclose Their Fee Arrangements.

The Attorney General erroneously argues that the problem with the statutes in *Riley* was their across-the-board applicability to all fee arrangements in excess of a certain percentage and that *Riley* does not limit his right to bring a common law fraud action against an individual fundraiser who earns a particular high fee. (AG Pet. at 11). To begin with, in arguing that his claim is one for common law fraud the Attorney General mischaracterizes his own Amended Complaint. He ignores that, just as in *Riley*, *Munson* and *Schaumburg*, his case is grounded on alleged statutory violations. Indeed, he claims the Fundraisers have violated not one but three statutes—the Illinois Solicitation For Charity Act, the Illinois Consumer Fraud and Deceptive Practices Act and the UDTPA.[5]

The Attorney General further errs in claiming free speech is less chilled by giving him the discretion to pick and chose which fundraisers to sue than by a blanket statutory prohibition. (AG Pet. at 12.) The Illinois Supreme Court properly rejected this argument, reasoning that this Court's teachings regarding "the government's rights to pursue 'less intrusive' measures . . . plainly meant that the government retained the right to regulate conduct of fundraisers in a manner that was 'less intrusive' of their *constitutional rights*. The present action is not 'less intrusive' . . . simply because it is an instance of individual litigation." 198 Ill.2d at 358 (emphasis in original).

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[5] Of course, the precise nature of the Attorney General's claims is difficult to determine because he did not plead each separate cause of action as a separate count as §2-603 of the Illinois Code of Civil Procedure requires. 735 ILCS 5/2-603.

The First Amendment does not permit constitutional rights to be eroded lawsuit by lawsuit. This Court has held that actions in tort which would restrict First Amendment freedoms violate the First and Fourteenth Amendments. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Board of County Comm'rs Wabaunsee County v. Umbehr*, 518 U.S. 668, 674 (1996) ("Constitutional violations may arise from the deterrent or 'chilling' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights.").

Far from permitting fraud actions based upon official discretion, *Munson* and *Riley* specifically held that these, too, were unconstitutional. The Maryland statute in *Munson* gave the Secretary of State the discretion to grant a waiver of the statute "whenever necessary." The Secretary of State argued that this made the law constitutional because she had granted such waivers in an extremely liberal manner, with special care shown for the rights of advocacy groups. 467 U.S. at 964 n.12. This Court disagreed and explained why giving a state official such discretion would threaten free speech:

> [E]ven if the Secretary of State were correct, the waiver provision were broad enough to allow for exemptions "whenever necessary," we would find the statute only slightly less troubling. Our cases make clear that a statute that requires such a "license" for the dissemination of ideas is inherently suspect. *By placing discretion in the hands of an official to grant or deny a license, such a statute creates a threat of censorship that by its very existence chills free speech.* Under the Secretary's interpretation, charities whose First Amendment rights are abridged by the fundraising limitations simply would have traded a direct prohibition on their activity for a licensing scheme that, if it is

> available to them at all, is available only at the unguided discretion of the Secretary of State.

Id. (emphasis added).

Riley likewise stressed the dangers of allowing public officials to decide whether to restrict free speech on a case-by-case basis. While the North Carolina statute created a presumption of unreasonableness, a professional solicitor could still avoid its reach by showing to the factfinder's satisfaction that the fee was necessary. 487 U.S. at 793. As described by the state in *Riley*, the factfinder made the ultimate determination as to whether the fee was reasonable on a case-by-case basis. *Id.* This Court found this scheme to be "fundamental[ly] flawed":

> Even if we agreed that some form of a percentage-based measure could be used, in part, to test for fraud, we could not agree to a measure that requires a speaker to prove "reasonable" case by case based upon what is at best a loose inference that the fee might be too high.

Id.

Riley explained why such an arrangement could only chill free speech:

> [O]f course, in every such case, the fundraiser must bear the costs of litigation and the risk of a mistaken adverse finding by the factfinder, even if the fundraiser and the charity believe that the fee was in fact fair. This scheme must necessarily chill speech in direct contravention of the First Amendment's dictates.

Id. at 794.

This case illustrates these predicted dangers. The Attorney General has spent ten years litigating the fairness

of an arms-length, bargained-for fee arrangement between a charity and its fundraisers based on his arbitrary contention that the Fundraisers' gross fees are earning too much. The Fundraisers have not only had to spend vast amounts of money, time and resources fighting for their constitutional rights, but also have had to labor under the cloud that, should the Attorney General succeed, they could lose their livelihood and face financial ruin.

To uphold the Amended Complaint would place all charitable fundraisers at the mercy the Attorney General's whims. Potentially any gross fee can be called "too high." Potentially any contract or arrangement can be called "unreasonable." Every time a fundraiser contracts with a charity it would take the risk that it may lose the entire fruit of its efforts, be forced out of business, face untold amounts of punitive damages and other draconian civil and possibly even criminal penalties for its conduct. There is nothing to prevent the Attorney General from using fees as a pretext to punish those charities he does not like.

Riley held that the constitution does not permit state officials to so threaten protected speech:

> This chill and uncertainty might well drive professional fundraisers out of North Carolina, or at least encourage them to cease engaging in certain types of fundraising (such as solicitations combined with the advocacy and dissemination of information) or representing certain charities (primarily small or unpopular ones), all of which will ultimately "reduc[e] the quantity of expression." Whether one views this as a restriction of the charity's ability to speak, or a restriction of the professional fundraisers' ability to speak, the restriction is undoubtedly one on speech, and cannot be countenanced here.

487 U.S. at 794 (citations omitted). Here, the Attorney General is specifically asking the Court to drive the Fundraisers out of business in Illinois, (R. Vol. I, C-213), exactly what *Riley* said "cannot be countenanced." *Id.*

4. The Attorney General Seeks to Unconstitutionally Compel Protected Speech.

The Attorney General argues that the *Riley* Line of Authority permits a fraud action against the Fundraisers because they allegedly represented that monies donated would be used for Vietnow's charitable purposes but did not represent that, pursuant to their contracts with Vietnow, only 15% of the proceeds raised went to Vietnow. Contrary to the Attorney General's claim, as the Illinois Supreme Court correctly found, "the Amended Complaint is, in essence, an attempt to regulate the [Fundraisers'] ability to engage in a protected activity based upon a percentage-rate limitation. This is the same regulatory principle that was rejected in *Schaumburg*, *Munson* and *Riley*." 198 Ill.2d at 359.

Significantly, and fatal to the Amended Complaint, the Attorney General made no attempt to articulate when a fundraiser has a "duty" to disclose its fees or what standards to use to make this determination. Instead, he asks for arbitrary power that would chill speech. The Illinois Supreme Court recognized the danger of the Attorney General's approach: "Fund-raisers . . . would be at a constant risk of incurring litigation costs, as well as civil and criminal penalties, which could produce a chilling effect on protected speech, based on nothing more than a loose inference that the fee might be too high." 198 Ill.2d at 362 (internal quotation marks and citations omitted).

Along with striking down the fee schedule set forth in North Carolina's charitable solicitation statute, *Riley* also

struck down a provision of the statute which required a fundraiser to disclose the percentage of funds it kept as its fees during the prior twelve months. Just as the Attorney General does here, (AG Pet. at 11), North Carolina argued in *Riley* that the mandatory disclosure of fees was justified by the state's interest in informing donors how the money they contribute is spent to dispel what the state alleged was a misperception by donors that the money they give to professional fundraisers goes in greater-than-actual proportion to benefit charity. 487 U.S. at 798. This Court held that the disclosure requirement compelled speech and was therefore a content-based restriction subject to exacting First Amendment scrutiny. *Id.* at 789. This Court found that the mandatory disclosure rule could not withstand such scrutiny because the proffered state interest was "not as weighty as the state asserts" and that "the means chosen to accomplish it are unduly burdensome and not narrowly tailored." *Id.* at 798. The Attorney General's claim not withstanding, these same concerns apply as much to a lawsuit aimed at a fundraiser's failure to disclose as to a statute.

In *Riley*, this Court recognized that donors are aware that solicitors incur costs to which part of their donation might apply. *Id.* at 799. The Attorney General never has disputed this. *Riley* also emphasized that donors are free to inquire how much of their contribution will be turned over to the charity. *Id.* Consistent with this allowable inquiry, Illinois law requires fundraisers to respond truthfully to such questions. *See* 225 ILCS 460/18(c).

Likewise, as the *Riley* Line of Authority notes, a state's legitimate interest in preventing fraud can be satisfied by methods that do not impinge on First Amendment freedoms. As *Riley* noted, a state is free to require charitable fundraisers to discharge certain financial information to the state. *Id.* at 795. As Ex. D to the Amended Complaint demonstrates, (R. Vol. I, C-68-87), Illinois requires such

disclosures and Telemarketing has complied. Indeed, that appears to be where the Attorney General obtained his figures regarding the Fundraisers' Illinois fees. (R. Vol. I, C-207-208). *Riley* also noted a state is free to publish these financial disclosure forms. *Id.* at 800. Moreover, a state may turn to its existing fraud laws where actual misrepresentations were made. *Id.*; *Munson*, 467 U.S. at 967; *Schaumburg*, 444 U.S. at 637. Here the Attorney General can point to no actual misstatement by the Fundraisers because they said nothing fraudulent or untruthful in representing that the funds raised benefited Vietnow. As a result, as discussed below, the Fundraisers' fee arrangements cannot provide the basis for fraud or breach of fiduciary duty claims.

B. The Amended Complaint Does Not State Valid Claims For Fraud or Breach of Fiduciary Duty.

The Attorney General argues that his Amended Complaint states causes of action for fraud and breach of fiduciary duty[6] based upon the facts that the Fundraisers

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[6] In the Illinois courts, the Attorney General also erroneously claimed that the Fundraisers, who solicit and receive money from the donating public, breached a fiduciary duty based upon their failure to affirmatively disclose the amount of their fees. As with fraud Illinois law imposes a disclosure obligation only upon a fiduciary with a duty to disclose. *E.g.*, *Chicago Park District v. Kenroy*, 78 Ill.2d 555, 402 N.E.2d 181 (1980). Consistent with First Amendment analysis, no such duty arises where what is not disclosed is protected speech. Moreover, even though the fundraisers in the *Riley* Line of Authority solicited and collected money from the donating public, this Court found they had a constitutional right not to disclose

(continued...)

charged gross fees that the Attorney General deems were excessive and the Fundraisers did not disclose their gross fee arrangements to potential donors. For the many reasons discussed above, these allegations violate the First Amendment.

To support his claim, the Attorney General cites a number of cases setting forth the basic elements required to plead a fraud claim. It is hornbook law however that before an omission can be the basis of a fraud claim there must be an intent to deceive "under circumstances creating an opportunity *and duty* to speak." *Perlman v. Time, Inc.*, 64 Ill.App.3d 190, 195, 380 N.E.2d 1040 (1st Dist. 1978) (emphasis supplied). *See Lidecker v. Kendall College*, 194 Ill.App.3d 309, 314, 550 N.E.2d 1121 (1st Dist. 1990); *Central States Joint Board v. Continental Assurance Co.*, 117 Ill.App.3d 600, 604, 453 N.E.2d 932 (1st Dist. 1983). The same is true to state a claim for fraudulent concealment. *See Connick v. Suzuki Motor Co.*, 174 Ill.2d 482, 500, 675 N.E.2d 584 (1996); *Hirsch v. Feuer*, 299 Ill.App.3d 1076, 1086, 702 N.E. 265 (1st Dist. 1998); *Lagen v. Lagen*, 14 Ill.App.3d 74, 79, 302 N.E.2d 201 (1st Dist. 1973).[7]

Indeed, in the cases cited by the Attorney General, fraud was found premised upon the existence of such a duty. For example, *Buechin v. Ogden Chrysler-Plymouth, Inc.*, 159 Ill.App.3d 237, 511 N.E.2d 1330 (2d Dist. 1987), (AG Pet. at 8), involved a consumer purchase of a car that was falsely represented by the seller to be new. The basis for the court's finding that the seller had misrepresented material

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(...continued)
their fees. In this Court, the Attorney General seems to have abandoned his breach of fiduciary duty claim.

[7] The *amici* States advance a similarly incorrect analysis of state fraud principles. (Amici Br. at 2-4.)

facts was the seller's *duty* to advise the purchasers that the cars previously had been sold. Likewise, in *Pence v. United States*, 316 U.S. 332 (1942), (AG Pet. at 8), an insured was found to have engaged in fraud where he made statements about his health condition for purposes of obtaining disability compensation that contradicted prior statements made in his application for reinstatement of his life insurance policy after it had lapsed for nonpayment of premiums—a condition which he had a duty to report honestly. Similarly, in *Glazewski v. Coronet Ins. Co.*, 108 Ill.2d 243, 483 N.E.2d 1263 (1985), (AG Pet. at 7, 8), a complaint alleging fraud against an insurance company was upheld where the company failed to disclose that the uninsured motorist coverage that it issued had no value, a disclosure that the insurance company had a duty to make. Indeed, in *In re Witt*, 145 Ill.2d 380, 538 N.E.2d 526 (1991), (AG Pet. at 7, 8), a judicial disciplinary proceeding, the court found the judge had not engaged in fraud because he did not have a duty to disclose on his Statement of Economic Interest a loan from a litigant which was a legitimate economic transaction.

Further, the Attorney General's reliance upon *United States v. Ciccone*, 219 F.3d 1078 (9th Cir. 2000), (AG Pet. at 8 n.2), is particularly misplaced. In that case, the head of a company that solicited charitable donations was convicted of wire fraud and other criminal offenses based upon affirmative misrepresentations to potential donors including that they had won a fabulous prize that did not exist. Indeed, the defendant conceded that his company defrauded people. His defense, which was not accepted, was that he was not a knowing participant in the scheme.

Further, the Attorney General's and *amici* States' position that the Illinois Supreme Court's decision did not question the sufficiency of the Amended Complaint under state law and based its decision solely upon First Amend-

ment grounds is absolutely incorrect. In its recitation of the facts, the Illinois Supreme Court highlights that the Amended Complaint contains "no allegation that defendants made affirmative misstatements to potential donors." 198 Ill.2d at 348. Moreover, in concluding that the Amended Complaint is an improper attempt to regulate the Fundraisers' ability to engage in protected activity based upon a percentage rate limitation, the Illinois Supreme Court relied upon the insufficiency of the Amended Complaint under state law: "[T]he statements made by defendants during solicitation are alleged to be 'false' only because defendants retained 85% of the gross receipts and failed to disclose this information to donors." 198 Ill.2d at 359.

No matter how many ways the Attorney General tries to cast it, the result is the same. His Amended Complaint does not state a claim for fraud because the Fundraisers made no affirmative mispresentations and, as made clear by this Court's teachings in the *Riley* Line of Authority, they had no duty to voluntarily disclose the percentage of the fees they retained to potential donors. The Illinois Supreme Court recognized this deficiency and properly affirmed the dismissal of the Amended Complaint.

II. NO IMPORTANT ISSUE IS PRESENTED BY THE ILLINOIS SUPREME COURT'S DECISION WHICH IS CONSISTENT WITH THIS COURT'S PRECEDENT AND ALLOWS STATE FRAUD ACTIONS PROPERLY BASED, CONSISTENT WITH THE FIRST AMENDMENT, UPON AFFIRMATIVE MISREPRESENTATIONS.

The Attorney General's and *amici* States' claim that the Illinois Supreme Court's ruling eliminates all governmental fraud cases is disingenuous. All that is prohibited, consistent with the First Amendment, are fraud actions based upon the fundraiser's failure to affirmatively volunteer its fee arrangement. As this Court has made clear, there can

be no duty to disclose a fact about which one has a constitutional right to remain silent. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1993). ("[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'") (citation omitted). The *Riley* Line of Authority gives the Fundraisers that right.

The Attorney General argues that donors would not have given to Vietnow if they had known the Fundraisers' fee. But this is precisely why this Court in *Riley* found the compelled disclosure of fees to be unconstitutional:

> [T]he compelled disclosure will almost certainly hamper the legitimate efforts of professional fundraisers to raise money for the charities they represent. First, this provision necessarily discriminates against smaller and unpopular charities, which must usually rely on professional fundraisers .... Campaigns with high costs and expenses carried out by professional fundraisers must make unfavorable disclosures, with the predictable result that such solicitations will prove unsuccessful. Yet the identical solicitation with its high costs and expenses, if carried out by the employees of a charity or volunteers, results in no compelled disclosure, and therefore greater success. Second, in the context of a verbal solicitation, if the potential donor is unhappy with the disclosed percentage the fundraiser will not likely be given a chance to explain the figure; the disclosure will be the last word spoken as the donor closes the door or hangs up the phone. Again, the predicable result is that the professional fundraisers will be encouraged to quit the State or refrain from engaging in solicitations that result in an unfavorable disclosure.

487 U.S. at 799 (emphasis added).

The Attorney General claims that the *Riley* Line of Authority left open the question "whether, and in what manner, common law fraud principles must be modified to accommodate the First Amendment in a particular factual situation." (AG Pet. at 15.) Those cases did nothing of the sort. The very point of those cases was to make clear the protections afforded professional fundraisers by the First Amendment. The Attorney General's desire to "modify" state fraud principles is simply his attempt to make an end run around these First Amendment protections.

Likewise, the Attorney General is incorrect when he claims that the Illinois Supreme Court's decision has rendered useless a state's use of its anti-fraud laws to combat solicitation fraud. To the contrary, the Fundraisers are not claiming to be immune from Illinois fraud laws. Rather, as the Illinois Supreme Court recognized and as the *Riley* Line of Authority holds, they are subject to fraud laws properly and fairly applied to instances of actionable misrepresentation. That is not what the Attorney General is doing. Rather, he is trying to twist the meaning of Illinois fraud law to apply to content—the amount of fundraisers' fees (without regard, of course, for the significant expenses associated with their solicitation)—that this Court has said is protected speech and may not be treated as a form of fraud.

That the Amended Complaint was dismissed does not, as the Attorney General and *amici* States disingenuously claim, prohibit the Attorney General from ever looking behind the use of funds solicited for a charity. If, unlike the conduct here, fundraisers engage in affirmative misrepresentation, then, consistent with the *Riley* Line of Authority, state anti-fraud provisions appropriately can be used to combat that misconduct. As a result, the imagined evils to the donating public, as described by the Attorney General and the *amici* States from affirmance of the decision below

are simply that—imagined. The Illinois Supreme Court's decision is consistent with this Court's precedent and Illinois law.

CONCLUSION

For each of the reasons set forth above, either independently or in combination, the Illinois Attorney General's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

ILLINOIS SOLICITATION FOR CHARITY ACT

225 ILCS 460/9(c). Actions for Violation of Act

Whenever the Attorney General shall have reason to believe that any charitable organization, professional fundraiser, or professional solicitor is operating in violation of the provisions of this Act, or if any of the principal officers of any charitable organization has refused or failed, after notice, to produce any records of such organization or there is employed or is about to be employed in any solicitation or collection of contributions for a charitable organization any device, scheme, or artifice to defraud or for obtaining money or property by means of any false pretense, representation or promise, or any false statement has been made in any application, registration or statement required to be filed pursuant to this Act, in addition to any other action authorized by law, he may bring in the circuit court an action in the name, and on behalf of the people of the State of Illinois against such charitable organization and any other person who has participated or is about to participate in such solicitation or collection by employing such device, scheme, artifice, false representation or promise, to enjoin such charitable organization or other person from continuing such solicitation or collection or engaging therein or doing any acts in furtherance thereof, or to cancel any registration statement previously filed with the Attorney General.

In connection with such proposed action the Attorney General is authorized to take proof in the manner provided in Section 2-1003 of the Code of Civil Procedure.

225 ILCS 460/15. Statements or representations made during solicitation

(a) Trustees of charitable trusts, organizations and corporations have a duty to supervise fund raising activities to ensure that contributions are adequately protected and

devoted to the proper purpose and that statements or representations made during solicitations to the public are true and correct.

(b) If any person, including a charitable organization, a professional fundraiser or a professional solicitor, in conducting a fundraising campaign for a charitable organization or for charitable or ostensibly charitable purposes:

> (5) Engages in any public solicitation and therein purports to relate the purpose or purposes for which the funds are solicited, such shall then be fully and accurately identified to the prospective donor. If a charitable organization whose purposes include the rendering of noneducational program services intends to expend or budget more than 50% of its program service expenditures for informing or educating the public and the funds being solicited will be used for such purpose, the donor at his or her request must be told that a primary use of the program funds will be for public education.

225 ILCS 460/18. Misrepresentations of fact

In any solicitation of contributions for a charitable organization it shall be deemed a misrepresentation of fact if any person:

> (c) Who is a professional fundraiser or professional solicitor and refuses or fails to supply, upon the request of a person being solicited, the hourly rate charge or the estimated percentage or actual percentage, if known, which is to be paid to or retained by the professional fundraiser and solicitor and the amount to be paid to the charitable organization under the fundraising contract then in effect and the amount to be paid to the charitable organizations.

ILLINOIS CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT

815 ILCS 505/1. Definitions

(a) The term "advertisement" includes the attempt by publication, dissemination, solicitation or circulation to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in any merchandise and includes every work device to disguise any form of business solicitation by using such terms as "renewal", "invoice", "bill", "statement", or "reminder", to create an impression of existing obligation when there is none, or other language to mislead any person in relation to any sought after commercial transaction;

(b) The term "merchandise" includes any objects, wares, goods, commodities, intangibles, real estate situated outside the State of Illinois, or services;

(c) The term "person" includes any natural person or his legal representative, partnership, corporation (domestic and foreign), company, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestui que trust thereof;

(d) The term "sale" includes any sale, offer for sale, or attempt to sell any merchandise for cash or on credit.

(e) The term "consumer" means any person who purchases or contracts for the purchase of merchandise not for resale in the ordinary course of his trade or business but for his use or that of a member of his household.

(f) The terms "trade" and "commerce" mean the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of this State.

(g) The term "pyramid sales scheme" includes any plan or operation whereby a person in exchange for money or other thing of value acquires the opportunity to receive a benefit or thing of value, which is primarily based upon the inducement of additional persons, by himself or others, regardless of number, to participate in the same plan or operation and is not primarily contingent on the volume or quantity of goods, services, or other property sold or distributed or to be sold or distributed to persons for purposes of resale to consumers. For purposes of this subsection, "money or other thing of value" shall not include payments made for sales demonstration equipment and materials furnished on a nonprofit basis for use in making sales and not for resale.

815 ILCS 505/2. Unlawful practices

Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act.

UNIFORM DECEPTIVE TRADE PRACTICES ACT

815 ILCS 510/2. Acts constituting deceptive trade practice

(a) A person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, the person:

(1) passes off goods or services as those of another;

(2) causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

(3) causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with or certification by another;

(4) uses deceptive representations or designations of geographic origin in connection with goods or services;

(5) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he or she does not have;

(6) represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;

(7) represents that goods or services are of a particular standard, quality, or grade or that goods are a particular style or model, if they are of another;

(8) disparages the goods, services, or business of another by false or misleading representation of fact;

(9) advertises goods or services with intent not to sell them as advertised;

(10) advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(11) makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;

(12) engages in any other conduct which similarly creates a likelihood of confusion or misunderstanding.

(b) In order to prevail in an action under this Act, a plaintiff need not prove competition between the parties or actual confusion or misunderstanding.

(c) This Section does not affect unfair trade practices otherwise actionable at common law or under other statutes of this State.

Supreme Court, U.S.
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No. 01-1806

In the

Supreme Court of the United States

THE PEOPLE OF THE STATE OF ILLINOIS
***ex rel.* JAMES E. RYAN, ATTORNEY GENERAL**
OF THE STATE OF ILLINOIS,

Petitioner,

v.

TELEMARKETING ASSOCIATES, INC.,
RICHARD TROIA and ARMET, INC.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. This Case Presents the Significant, Unresolved Question Whether the First Amendment Displaces Generally-Applicable Fraud Principles in Individual Fraud Actions Focusing on Specific Charitable Solicitations.

Respondents' brief in opposition to Illinois' *certiorari* petition simply reinforces the conclusion that this case squarely presents a significant First Amendment issue never decided by the Court. That issue is whether, in the context of an individual action involving particular charitable solicitations, the free speech clause displaces generally-applicable fraud principles so that a fraud claim cannot be asserted against a professional fundraiser who represents that donations will be used for charitable purposes but in fact keeps virtually all the funds donated. The Court should resolve this issue to provide much-needed guidance in this area of substantial national importance.

Despite the multitude of arguments made in Respondents' brief, their position essentially boils down to the proposition that the First Amendment shields a professional fundraiser from any liability under the common law of fraud or its statutory counterparts as long as its charitable solicitations stop short of naked lies, and instead rely only on deceptive implications and half-truths. (Brf. in Opp. at 7, 8, 23, 28.) Both sides agree that the Illinois Supreme Court's opinion in this case effectively embraces such an interpretation of the First Amendment. (Pet. at 10 n.4; Brf. in Opp. at 7-8, 26.) Contrary to what Respondents maintain, however, that result is not controlled by this Court's decisions in *Village of Schaumburg v. Citizens For a Better Environment*, 444 U.S. 620 (1980), *Secretary of State v. Joseph H. Munson*

Co., 467 U.S. 947 (1984), and *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988). There are compelling reasons, though, for the Court to decide whether the First Amendment does, as the Illinois Supreme Court held, protect the type of conduct alleged here: particular and intentionally deceptive charitable solicitations that do little more than generate income for professional telemarketing companies.

A. The Illinois Supreme Court Based Its Decision Solely on the First Amendment.

The Illinois Supreme Court did not, as Respondents suggest, base its decision on state law. (Brf. in Opp. at 25-26.) To the contrary, that court explicitly grounded its ruling solely on its understanding of the First Amendment as interpreted in *Riley*, *Munson* and *Schaumburg*. (App. 6-17.) Its analysis "begin[s] by examining the scope of first amendment guarantees afforded charitable solicitations" (*id.* at 6) and, after a lengthy discussion of *Riley*, *Munson* and *Schaumburg*, "conclude[s] . . . that the Attorney General's complaint is prohibited under first amendment principles" and is "constitutionally deficient under *Schaumburg*, *Munson* and *Riley*." (*Id.* at 17.)

Although the Illinois Supreme Court's opinion notes that Illinois' Complaint alleges claims for "common law fraud," "false pretenses" and violations of several anti-fraud statutes (App. 3-4), the opinion neither discusses the elements of such claims nor addresses whether the Complaint satisfactorily alleges any of those elements. (App. 5-17.) And it certainly does not hold, as Respondents wrongly suggest (Brf. in Opp. at 23-26), that Illinois law regarding those claims prohibits only explicit misstatements of fact. (*See* Pet. at 7-8.) The decision

below therefore squarely raises the constitutional issue that Illinois asks the Court to resolve.

B. This Case is Not Controlled by the Court's Decisions in *Riley*, *Munson* and *Schaumburg*.

There is likewise no basis for Respondents' contention that this Court's rulings in *Riley*, *Munson* and *Schaumburg* control the outcome in this case. Neither the facts in those cases nor their reasoning dictates the result reached by the Illinois Supreme Court.

Whereas this case involves an individual fraud action focusing on what Respondents actually communicated to donors, *Riley*, *Munson* and *Schaumburg* involved statutes that prohibited charitable solicitations based solely on how donations were spent. Those statutes branded an entire category of charitable solicitations illegal (either conclusively or presumptively) even absent *any* representation by the charitable organization or fundraiser. Here, by contrast, Illinois' Complaint focuses on *actual representations* made by Respondents regarding how donations for a particular charity would be used, and on the deceptive nature of those representations in light of other information Respondents withheld. In light of that critical difference, *Riley*, *Munson* and *Schaumburg* cannot be controlling precedent on the issue raised here. *See Texas v. Cobb*, 532 U.S. 162, 169 (2001) ("Constitutional rights are not defined by inferences from opinions which did not address the question at issue.").

The logic of *Riley*, *Munson* and *Schaumburg* also does not automatically extend to the different situation presented in this case. Illinois' fraud action against Respondents does not attempt to regulate the "reasonableness" of their fee, *see Riley*, 487 U.S. at 790-91 (condemning the

"paternalistic premise" that government, not charities, should decide how charitable funds should be spent), or to "equate" that fee *alone* with fraud. (Brf. in Opp. at 13.) Instead, Illinois complains that Respondents induced donors to contribute money by representing that donations would be used to provide food, clothing and shelter to needy veterans, when in fact Respondents actually kept 85 percent of those donations (and only *three percent* was actually devoted to such programs). (Pet. at 2.) Because Illinois' claims in this case are not based on Respondents' fundraising fee *alone*, *Riley*, *Munson* and *Schaumburg*, which declare such a basis insufficient to restrict charitable solicitations, are not controlling here.

Riley also does not compel the conclusion that using Respondents' fee as evidence to prove Illinois' fraud claim constitutes unconstitutionally "forced speech." Again, it is Respondents' *own* representations regarding how donations would be used—a factor not present in *Riley*—that makes the extraordinarily high percentage of donations they kept relevant to demonstrate the deceptive nature of those representations. By invoking a "constitutional right to remain silent" (Brf. in Opp. at 27), Respondents are improperly trying to have it both ways. Neither the law of torts nor the constitution permits a person to abuse the general right to remain silent when doing so would, in light of other statements voluntarily made, perpetrate a fraud. *See* Page Keeton, *et al.*, *Prosser and Keeton on The Law of Torts*, § 106 (5th ed. 1984) ("if the defendant does speak, he must disclose enough to prevent his words from being misleading"); Fleming James, Jr. and Oscar S. Gray, *Misrepresentation – Part II*, 37 Md. L. Rev. 488, 523-26 (1978); *cf. United States v. Nobles*, 422 U.S. 225, 241 (1975) ("one cannot invoke the Sixth Amendment as a justification for presenting what

might have been a half-truth"); *Johnson v. United States*, 318 U.S. 189, 195 (1943) ("The case of an accused who voluntarily takes the stand and the case of an accused who refrains from testifying are of course vastly different.") (citations omitted).

Respondents admit they are lawfully required to disclose the portion of donations they keep when asked that question. (Brf. in Opp. at 22.) And they apparently agree that their fundraising fee would be admissible in a fraud action against them if they affirmatively misstated that fee. (*Id.* at 28.) Thus, Respondents' arguments ultimately come down to the position that the First Amendment forecloses any fraud claim against a professional fundraiser or charitable solicitor except in the case of explicit falsehoods, as opposed to frauds perpetrated through deceptive implications and half truths. (*Id.* at 7, 8, 23, 28.) Even if that principle—which is not supported by the law of fraud in Illinois (Pet. at 7-8)—were constitutionally defensible, it is not one mandated by any of this Court's precedents.

Indeed, the Court's statements indicate just the opposite. In *Riley* the Court affirmed that States could "vigorously enforce [their] antifraud laws to prohibit professional fundraisers from obtaining money on *false pretenses* or by making false statements." 487 U.S. at 795 (emphasis added). In *Schaumburg* the Court similarly approved a law making it "unlawful for a . . . solicitor to cheat, deceive or fraudulently misrepresent." 444 U.S. at 637 n.11. In making these statements, moreover, the Court did not suggest that it intended to depart from the common meaning of the terms "misrepresentation" and "false pretenses" by limiting them to explicit misstatements, as distinguished from intentionally deceptive half-truths and implied falsehoods. (*See* Pet. at 7-8;

Amici Brf. at 3.) *See also Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. ___, ___, 122 S. Ct. 2080, 2087-88 (2002) (acknowledging the government's ability "to protect its citizens from fraudulent solicitation") (citing *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940)). This case presents precisely what *Riley* contemplated and *Schaumburg* approved.

II. The Court Should Grant the Petition to Resolve this Significant Constitutional Issue Concerning a Matter of National Importance.

In urging the Court not to take this case, Respondents insist that no adverse consequences will result because the First Amendment still allows States to enforce their laws against fraud whenever a telemarketer or other professional fundraiser makes an "actual misstatement." (Brf. in Opp. at 23, 28.) That reassurance is hardly comforting. As one court aptly observed, limiting fraud liability to "literal falsehoods" simply shields from scrutiny the "clever use of innuendo, indirect intimations, and ambiguous suggestions . . . when protection against such sophisticated deception is most needed." *American Home Products Corp. v. Johnson & Johnson*, 577 F.2d 160, 165 (2d Cir. 1978). The same is true for intentionally deceptive half-truths.[1] Indeed, the disturbing implications of

[1] This Court has repeatedly made this point. *See, e.g., Bronston v. United States*, 409 U.S. 352, 358 n.4 (1973) (noting that the law regarding criminally fraudulent statements includes the "intentional creation of false impressions by a selection of literally true representations"); *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 188-89 (1948) (observing that communications "as a whole may be completely misleading (continued...)

such a limitation are illustrated by Respondents' assertion to the Illinois Supreme Court that their representations to donors about how contributions are used could not constitutionally support a fraud claim even if they kept *99 percent* of all money donated. (Pet. at 16 n.13.) Under that view the First Amendment would simply become an engine for fraud clothed in the garb of free speech.

Given the hundreds of billions of dollars generated by charitable solicitations each year, including an ever-increasing amount raised by professional telemarketers, the potential mischief invited by the Illinois Supreme Court's decision is obvious. The *Amici* States accurately observe that the opportunistic exploitation of people's charitable impulses shows no sign of diminishing, and that the uncertainty created by the Illinois Supreme Court's decision will simultaneously embolden unscrupulous fundraisers and deter States from using their limited resources to target charitable solicitation fraud that does not clearly involve explicit lies. (*Amici* Brief at 5-7.) Respondents tellingly make virtually no attempt to address these serious concerns by 18 States and the Commonwealth of Puerto Rico. (Brf. in Opp. at 26-28.)

[1] (...continued)
although every sentence separately considered is literally true"); *Equitable Life Insurance Co. of Iowa v. Halsey, Stuart & Co.*, 312 U.S. 410, 426 (1941) ("a statement of a half-truth is as much a misrepresentation as if the facts stated were untrue") (applying Iowa law); *Wiser v. Lawler*, 189 U.S. 260, 264 (1903) (characterizing as a "gross fraud" prospectuses which, while not containing a "distinct assertion" of untrue fact, necessarily "produced upon the ordinary mind" a misleading inference and were "more damaging in their omissions than in their statements").

This Court has never decided whether the free speech clause of the First Amendment mandates the displacement of generally-applicable fraud principles in individual fraud actions by limiting the liability of professional fundraisers and other charitable solicitors to instances of explicit factual misstatements. This case squarely raises that issue, and the Court should grant review to correct the uncertainties created by the Illinois Supreme Court's decision in this area of substantial national importance.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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(2)

No. 01-1806

In the
SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, ATTORNEY GENERAL OF THE STATE OF ILLINOIS,

Petitioner,

v.

TELEMARKETING ASSOCIATES, INC., RICHARD TROIA, AND ARMET, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF OF THE STATES OF FLORIDA, ALABAMA, ALASKA, DELAWARE, INDIANA, KANSAS, MAINE, MARYLAND, MICHIGAN, MISSISSIPPI, MISSOURI, NEVADA, OHIO, SOUTH DAKOTA, TENNESSEE, UTAH, WEST VIRGINIA, WYOMING, AND THE COMMONWEALTH OF PUERTO RICO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI*

The question presented by this case is whether the First Amendment protects fraudulent misrepresentations regarding the intended uses for charitable donations. The *amici* are States, along with the Commonwealth of Puerto Rico (the "*amici* States"), that strongly believe the answer to this question is no.

With increasing frequency, the *amici* States are being asked to bring the force of state law to bear on those who misrepresent the intended uses for charitable donations. The terrorist tragedies of September 11, 2001, spurred a nationwide outpouring of charitable donations and shifted the public's attention toward how such donations are spent. Citizens are demanding that States take action against fundraisers who misrepresent how charitable donations will be used.

State law is meaningless in these cases, however, if *Ryan v. Telemarketing Associates, Inc.*, 763 N.E. 2d 289 (Ill. 2001), correctly interpreted the First Amendment to immunize those who misrepresent the uses intended for charitable donations. *Ryan* has created substantial uncertainty regarding how and whether States may prosecute this reprehensible form of solicitation, and the case conflicts with decisions of this Court and state courts regarding States' ability to regulate charitable solicitation fraud.

This brief will explore these concerns. Ultimately, the *amici* States urge this Court to grant the writ of certiorari requested by the Attorney General of Illinois and clarify this significant area of First Amendment law.

REASONS TO GRANT THE PETITION

I. *RYAN* HAS CREATED SUBSTANTIAL UNCERTAINTY REGARDING STATES' ABILITY TO PROSECUTE FRAUD CONCERNING THE INTENDED USES FOR CHARITABLE DONATIONS.

In *Ryan*, the Supreme Court of Illinois affirmed the dismissal of a fraud action against a fundraiser because, in that court's view, the fundraiser's actions were protected by the First Amendment. The court did not hold, or even suggest, that the claim brought by the Illinois attorney general was not a valid claim for fraud under state law. Rather, the decision relied solely upon the supremacy of federal law to negate an otherwise valid state action. This decision has created substantial uncertainty regarding the scope of the First Amendment and States' ability to regulate fraudulent representations concerning the intended uses for charitable donations.

A. THE CONDUCT AT ISSUE IN *RYAN* SATISFIES THE COMMON DEFINITION OF FRAUD.

The facts underlying the complaint in *Ryan* are neither complicated nor uncommon. A professional fundraiser contracted with a charity to solicit funds on the charity's behalf. The relevant contractual language obliged the fundraiser to remit to the charity only 15 percent, and in some cases only 10 percent, of the funds collected. The fundraiser solicited funds through telemarketers who contacted potential donors and described to them the services that donations would support. Donors were not told that less than 15 percent (or, in some cases, less than 10 percent) of their donations would be passed on to the charity, let alone that only part of that amount would eventually be used to support the charity's services, depending on the charity's practices.

If the telemarketers' statements intentionally misled donors to believe that at least a substantial portions of their donations would be used to finance the services described, and if those donors relied on that understanding when they made their donations, then under the law of Illinois, the fundraiser committed fraud. By statute, the Attorney General of Illinois has authority to prosecute such actions.

This result, under these facts, is not unique to the law of Illinois. Fraud is generally defined as a knowingly false representation of a material fact made with the intent to induce, and which does induce, another's detrimental reliance. *E.g.*, 37 Am. Jur. 2d *Fraud and Deceit* § 12 (1968); 37 C.J.S. *Fraud* §§ 2, 7 (1997); Restatement (Second) of Torts, § 525 (1977). A statement's literal truth does not preclude the existence of fraud where the message taken as a whole carries a false implication of fact. 37 Am. Jur. 2d *Fraud and Deceit* § 42; 37 C.J.S. *Fraud* § 24; Restatement (Second) of Torts, § 529.

In addition to the common law claim of fraud, states often offer one or more statutory devices to protect the public from fraudulent activities. Statutes based on the Uniform Deceptive Trade Practices Act, adopted in a large number of States, routinely provide consumers general protection from unscrupulous business practices.[1] Some States utilize charitable solicitation regulations to prohibit fraudulent acts in the specific context of charitable fundraising.[2] Also, as in Illinois, States

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[1] *See, e.g.*, Fla. Stat. § 501.201 *et seq.*; Del. Code Ann. tit. 6, § 2511 *et seq.*; Ind. Code § 24-5-0.5-2 *et seq.*; Mich. Comp. Laws § 445.901 *et seq.*; Ohio Rev. Code Ann. § 1345.01 *et seq.*; S.D. Codified Laws § 37-24-6.

[2] Florida's Solicitation of Contributions Act, for example, provides specific regulations regarding solicitors and is enforced by both the state's Attorney General and its Department of Agriculture and Consumer Services. Fla. Stat. Ch. 496. *See*

typically empower a state actor, such as the State's attorney general, to investigate suspected fraudulent activity and, if appropriate, to initiate a suit in a *parens patrie*-type capacity for relief that may include an injunction, sanctions, or money damages.[3]

Under these common law and statutory actions, a fundraiser who tells a potential donor that his or her charitable donation will support a particular service, and thereby represents that at least a substantial portion of the donation will be used in that manner, commits actionable fraud where the fundraiser knows that at least 85 or 90 percent of the funds will not be used to support those services. How that portion of the donation is in fact spent is irrelevant once it is established that this portion will not be used to support the service promoted to the donor at the time of the solicitation.

Accordingly, the fraud prosecution undertaken by the Illinois Attorney General in *Ryan* is representative of suits that could be brought in numerous states based on the same underlying conduct. As the *amici* States show in the following section, that underlying conduct is problematically prevalent, and the States seek this Court's guidance regarding their ability to use state law to challenge such conduct by charitable fundraisers.

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also, e.g., Del. Code Ann. tit. 6, § 2591 *et seq.*; Ind. Code § 23-7-8-7; Kan. Stat. Ann. § 17-1759 *et seq.*; Md. Code Ann., Bus. Reg. § 6-601 *et seq.*; Mich. Comp. Laws § 400.271 *et seq.*; Ohio Rev. Code Ann. Ch. 1716; S.D. Codified Laws § 37-30-17.

[3] *See, e.g.*, Fla. Stat. § 501.207; Del. Code Ann. tit. 6, § 2514; Ind. Code § 24-5-0.5-4; Kan. Stat. Ann. § 17-1773; Md. Code Ann., Bus. Reg. § 6-205; Mich. Comp. Laws § 400.290; S.D. Codified Laws § 37-24-12 *et seq.*

B. STATES REQUIRE GUIDANCE REGARDING THE PROSECUTION OF THOSE WHO MISREPRESENT THE INTENDED USES FOR CHARITABLE DONATIONS.

The *Ryan* complaint described events that are by no means uncommon. Modern solicitation efforts routinely evoke images of desperation in which persons will suffer cruel, undeserved hardships unless someone intervenes to alter that course -- intervention that will come, so the solicitor says, if donors will make the requested charitable contributions.

This technique is applicable in many contexts. Potential donors may be told, for instance, that children in an area are starving and that donations will be used to provide them with life-sustaining food. Donations may be said to provide victims of abuse with care, counseling, or shelter from their abusers. Or, as in *Ryan*, solicitors may claim that donations will provide hungry, homeless, or injured Vietnam War veterans with food, shelter, and financial support. *See generally* N. Barborak, *Saving the World, One Cadillac at a Time: What Can Be Done When a Religious or Charitable Organization Commits Solicitation Fraud?*, 33 Akron L. Rev. 577 (2000).

High-profile examples of these activities are on the rise, particularly following the surges in patriotism and charity engendered by the terrorist attacks on the United States on September 11, 2001. Those national tragedies encouraged many Americans to aid the victims of the attacks, as well as other causes, and numerous charity drives were launched at that time to great success. Many of those drives made effective use of representations regarding how donations would be used.

By painting a picture of the charitable works that donated funds will serve, fundraisers draw upon the emotions of potential donors. Giving in response to such appeals is understandable, as support for altruistic goals is a particularly human trait. Unfortunately, it is also a trait that may be exploited by those

who would mislead donors about the uses intended for their contributions.

States are receiving an increasing number of complaints regarding representations made in the course of charitable solicitation. In Florida, for example, the State's Attorney General has recently received numerous complaints regarding fundraisers who reportedly touted services for the victims of the September 11, 2001 terrorist attacks but who have given only a fraction of the money raised to support those services. In the case of one such fundraiser, Florida's Attorney General has already filed a suit under Florida's Deceptive and Unfair Trade Practices Act, and similar suits have been filed regarding other supposedly charitable solicitations. Florida understands that other States have also received numerous complaints of such abuses and are contemplating similar actions.

Adding to the heightened awareness of these problems are the media's recent efforts to investigate and publicize charitable solicitation fraud. For example, the front cover of the Sunday, June 30, 2002 edition of the St. Petersburg Times ran a story entitled, "Charity 10%, firefighters union 90%." The article reports that, for the past five years, a Tampa, Florida firefighters union that uses telemarketers to promote a camp for children burned by fire has spent less than 10 percent of the funds raised on charitable services. The story begins:

> The callers ask for donations for Camp Hopetake, a summer retreat where children burned by fire get a once-a-year escape from the rest of the world.
>
> The Tampa firefighters union raises more than a half-million dollars in the name of these children every year.
>
> But most of the money doesn't go to the kids. Last year, for every $100 donated, less than $10 went to Camp Hopetake and other charities. Ninety percent went to the union.

David Karp, *Charity 10%, firefighters union 90%*, ST. PETERSBURG TIMES, at 1A (Jun. 30, 2002). The article continues with a detailed report of the union's solicitation practices, including an account of how the union's telemarketers made potential donors believe that the union's costs were below average, when in fact they were not, by emphasizing that the union did not utilize professional fundraisers.

The increase in complaints regarding misleading charitable solicitations may be due to the application of greater scrutiny toward charitable fundraisers. The increase may also be due to a rise in the number of incidents involving fraud in the course of charitable solicitation. In either case, nothing suggests that this problem is diminishing, and citizens are calling upon the States to respond.

Existing state laws clearly prohibit misrepresenting the intended uses for charitable donations, but the States are mindful of how they expend their limited resources. Pursuing those who commit such frauds will be a misdirection of efforts if, as *Ryan* holds, the First Amendment protects such speech from prosecution. Accordingly, the Court should grant the writ requested in this case and resolve the important issue of whether State law may prohibit charitable fundraisers from misrepresenting the purposes that charitable donations will serve.

II. *RYAN* CONFLICTS WITH THIS COURT'S DECISIONS IN THE *RILEY* TRILOGY AND THE DECISIONS OF STATE COURTS.

In *Ryan*, the Illinois Supreme Court reached its conclusion by relying upon a trilogy of this Court's cases culminating in *Riley v. National Federation of the Blind, Inc.*, 487 U.S. 781 (1988). That reliance was severely misplaced, as the *Riley* trilogy involved materially different circumstances and, indeed, affirmatively stated that States may prosecute fraud in the context of charitable solicitations. The Illinois Supreme Court's decision thus conflicts with those cases. It also conflicts with

state court decisions that permitted States to prosecute fraud in connection with the intended uses of charitable donations. Only this Court can resolve these conflicts, and this presents another important reason that the Court should grant the writ of certiorari requested in this case.

Each case in the *Riley* trilogy addressed concerns that were not present in *Ryan*. The first case, *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), involved a state law that prohibited certain solicitations by any charitable organization that did not use at least 75 percent of its receipts for "charitable purposes." The second, *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), involved a similar provision, except that it exempted charities that were effectively prevented from raising contributions. In both cases, the Court held that the asserted justification for the statutes -- protecting the public from fraud -- were insufficient to overcome the charities' First Amendment right to speech. The essence of the Court's concern was the impermissibility of categorically equating fraud with a particular level of expenses, given the wide range of interests served and activities undertaken by various charities.

Riley concerned a state law that presumed the existence of fraud once a professional fundraiser's fees exceeded 35 percent, although the presumption could be rebutted. The law further required professional fundraisers to inform potential donors of the percentage of donations the fundraiser turned over to charities in the preceding 12 months. This Court held both aspects to violate the First Amendment. The presumption was invalidated because its premise -- that use of more than 35 percent of donations towards fees alone suggested fraud -- was flawed and because noncommercial speakers should not bear the burden of rebutting a presumption that their speech is unlawful. The Court rejected the percentage disclosure because that compelled speech did not meaningfully inform donors about the uses that donations would serve and only applied to professional fundraisers; thus, the requirement was not narrowly tailored to

meet the state's goal of disclosing how much of a donation would actually benefit a charity.

The *Riley* trilogy does *not* support the proposition that the percentage of funds retained by a professional fundraiser is beyond examination where a fundraiser in fact represents the uses to which donations will be put. Yet it was in this sense that the Illinois Supreme Court misinterpreted these cases. The Illinois court reasoned that the fundraiser in *Ryan* would not have committed fraud had it disclosed the percentage of funds it would retain, and the court read the *Riley* trilogy to forbid States to impose liability for the failure to disclose such information.

Ryan's interpretation of this Court's precedents is simply unsupportable. At most, this Court's holdings preclude the use of certain percentages as a complete and independent basis for presuming fraud in charitable solicitations. By comparison, the Illinois Attorney General alleged in *Ryan* that the fundraiser had made representations regarding how donated funds would be used and that, among other things, the percentage of funds retained by the fundraiser pursuant to its contract with the charity demonstrated that the fundraiser's representations were false. Those representations, together with the specific circumstances of how donated funds were intended to be used and were in fact used, constitute additional facts that take this case far outside the circumstances at issue in *Riley*, *Munson*, and *Village of Schaumburg*.

The Illinois Supreme Court not only misplaced its reliance on the *Riley* trilogy, the court ignored this Court's clear statements in those cases that States are free to prosecute fraud when it occurs in the context of charitable solicitations. *Village of Schaumburg* expressly stated that "[f]raudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly." 444 U.S. at 637. Likewise, *Riley* explained:

> [W]e do not suggest that States must sit idly by and allow their citizens to be defrauded. North

> Carolina has an antifraud law, and we presume that law enforcement officers are ready and able to use it.

487 U.S. at 795. *Ryan* plainly conflicts with these statements.

Ryan also conflicts with state law decisions that specifically permitted States to prohibit fraud regarding the intended uses of charitable donations. For example, in *Marcus v. Jewish National Fund (Keren Kayemeth Leisrael), Inc.*, 158 A.D. 2d 101 (N.Y. App. Div. 1990), the court affirmed a preliminary injunction that prevented a charity from misrepresenting how charitable donations would be used. Rejecting the charity's reliance on the First Amendment and *Riley*, the court concluded: "Certainly, a donor to a charity should be fully informed with respect to the use to which the contribution is being put and should not be misled into believing that the funds will be applied for one purpose when, in reality, they are being utilized somewhere else." *Id.* at 105.

Similarly, in *Commonwealth of Pennsylvania v. Events International, Inc.*, 585 A.2d 1146 (Pa. Commw. Ct. 1991), the court refused to dismiss a complaint by Pennsylvania's Attorney General against fundraisers accused of falsely representing that various charities would receive a substantial portion of contributions, where the charities actually received less than four percent of all contributions. The court held that the fundraisers had no First Amendment right to engage in solicitations that were misleading or deceptive, and the court permitted the case to continue.

These cases support the position that fundraisers should not be permitted to solicit donations by representing that the funds will support particular charitable services when, in fact, a substantial portion of those funds will not be used to support such services at all. Neither *Marcus* nor *Events International* can be reconciled with *Ryan*.

In sum, the Supreme Court of Illinois views the First Amendment as immunizing certain frauds conducted in the

course of charitable solicitation. The *amici* States disagree and support their view with this Court's language in *Village of Schaumburg* and *Riley*, as well as state law decisions such as those noted above. Only this Court can resolve the conflict between these positions, and the *amici* States encourage the Court to do so at this time and clarify this important area of First Amendment law.

CONCLUSION

For each of the foregoing reasons, this Court should grant the writ of certiorari requested in this case by the Attorney General of the State of Illinois.

Respectfully submitted,

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Counsel of Record

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Supreme Court U.S.
FILED
DEC 24 2002
OFFICE OF THE CLERK

No. 01-1806

In the

Supreme Court of the United States

THE PEOPLE OF THE STATE OF ILLINOIS
***ex rel.* JAMES E. RYAN, ATTORNEY GENERAL OF THE STATE OF ILLINOIS,**

Petitioner,

v.

TELEMARKETING ASSOCIATES, INC., RICHARD TROIA and ARMET, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 5, 2002
CERTIORARI GRANTED NOVEMBER 4, 2002

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The following opinions, judgments, and orders have been omitted in printing this joint appendix because they appear on the pages in the appendix to the Petition for Certiorari indicated:

Opinion of the Illinois Supreme Court, dated November 21, 2001 ..... Pet. App. 1

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LISTING OF RELEVANT DOCKET ENTRIES

People of the State of State of Illinois ex rel. James E. Ryan, Attorney General of the State of Illinois v. Telemarketing Associates, Inc., Richard Troia and Armet, Inc.

Date	Docket Entry
Circuit Court of Cook County, Illinois	
May 30, 1991	Complaint for Injunctive Relief, an Accounting, Appointment of Receiver, and Other Equitable Relief (with exhibits).
July 3, 1991	Answer to Complaint.
February 5, 1993	Defendants' Motion to Dismiss.
June 25, 1996	Amendments to Complaint (with exhibits).
September 6, 1996	Defendants' Motion to Dismiss.
November 4, 1996	Order (granting motion to dismiss as to fraud claims).
December 4, 1996	Plaintiff's Amendments to Complaint (with exhibits).
March 5, 1997	Defendants' Motion to Dismiss Amended Complaint

May 29, 1997	Order (granting motion to dismiss amended complaint as to fraud claims).
June 24, 1997	Plaintiff's Motion to Vacate Order and Reconsider Ruling
July 24, 1997	Order (denying Plaintiff's Motion to Vacate Order and Reconsider Ruling)
December 1, 1997	Agreed Judgment Order (dismissing all remaining claims in the Amended Complaint)
December 24, 1997	Notice of Appeal to the Illinois Appellate Court, First District

Illinois Appellate Court, First District

May 19, 2000	Opinion of the Illinois Appellate Court, First District, affirming the circuit court's order. *People v. Telemarketing Assoc.*, 313 Ill. App. 3d 559, 729 N.E.2d 965 (1st Dist. 2000).

Illinois Supreme Court

June 23, 2000	Plaintiff's Petition for Leave to Appeal to the Illinois Supreme Court
October 4, 2000	Order denying Petition for Leave to Appeal

October 31, 2000	Motion for Leave to File Motion for Reconsideration of the Order Denying Petition for Leave to Appeal
November 14, 2000	Order allowing Petition for Leave to Appeal
November 21, 2000	Opinion of the Illinois Supreme Court affirming the opinion of the Illinois Appellate Court, First District, and the circuit court order. *People v. Telemarketing Assoc.*, 198 Ill. 2d 345, 763 N.E.2d 289 (2001).
December 12, 2001	Petition for Rehearing.
February 4, 2002	Order denying Petition for Rehearing.

[Filed May 30, 1991]

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT – CHANCERY DIVISION

THE PEOPLE OF the STATE OF ILLINOIS *ex rel.* ROLAND W. BURRIS, Attorney General of Illinois,	)	
Plaintiff,	)	
vs.	)	91 CH 04926
TELEMARKETING ASSOCIATES, INC., an Illinois Corporation; ARMET, INC., an Illinois Corporation; and RICHARD TROIA, individually and as an Officer, Director and fiduciary of TELEMARKETING ASSOCIATES, INC., and ARMET, INC.,	)	
Defendants.	)	

COMPLAINT FOR INJUNCTIVE RELIEF, AN ACCOUNTING, APPOINTMENT OF RECEIVER, AND OTHER EQUITABLE RELIEF

NOW COMES the Plaintiff, THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* ROLAND W. BURRIS, Attorney General of Illinois, and pursuant to both statutory mandate and the common law complains of Defendants TELEMARKETING ASSOCIATES, INC., ARMET, INC., and RICHARD TROIA, individually and as a director, officer and fiduciary of both TELEMARKETING ASSOCIATES, INC. and ARMET, INC., and states as follows:

1. This cause of action is brought by Plaintiff, THE PEOPLE OF THE STATE OF ILLINOIS by its Attorney General, ROLAND W. BURRIS, pursuant to the Illinois Charitable Solicitation Act (Ill. Rev. Stat. 1989, ch. 23, par. 5101 *et seq.*) and the common law authority, power and duty of the Attorney General to protect the public's interest and rights as both donors to charity and as the ultimate beneficiaries of charitable trusts, charitable assets and monies solicited for charitable purposes. The Attorney General brings this matter at the urging of local Vietnow chapters due to their concerns about fundraising practices of Defendants.

2. Defendants TELEMARKETING ASSOCIATES, INC. (hereinafter "TELEMARKETING") is an Illinois business corporation incorporated July 28, 1982, with its principal place of business at 2924 North River Road, River Grove, Cook County, Illinois.

3. One hundred percent (100%) of TELEMARKETING's stock is owned by Defendant RICHARD TROIA (hereinafter "TROIA").

4. At all times relevant hereto, Defendant TROIA is and was the sole Director and President of TELEMARKETING and in that capacity managed and controlled the acts and practices of TELEMARKETING.

5. Defendant ARMET (hereinafter "ARMET") is an Illinois business corporation incorporated on September 28, 1989, with its principal place of business reportedly being at 2924 North River Road, River Grove, Cook County, Illinois.

6. On hundred percent (100%) of ARMET's stock is owned by Defendant TROIA.

7. At all times relevant hereto, TROIA was and is the sole Director and President of ARMET and in that capacity

managed and controlled the acts and practices of ARMET.

8. Vietnow National Headquarters (hereinafter "Vietnow") is an Illinois-based not-for-profit corporation with charitable purposes which was organized on December 31, 1984. Vietnow is associated with an Illinois State Chapter and 26 Vietnow local chapters in Illinois. Vietnow also operates as the national organization for several State organizations. A copy of Vietnow's Articles of Incorporation is attached hereto as Exhibit 'A' and incorporated by reference herein.

9. As a result of its exclusively charitable purposes as alleged herein, Vietnow is a charitable trust under Illinois law, and has registered as such with the Attorney General pursuant to section 6 of the Charitable Trust Act (Ill. Rev. Stat. 1989, ch. 14, par. 56) and section 2 of the Illinois Solicitation Act (Ill. Rev. Stat. 1989, ch. 23, par. 5102), which require respectively that all charitable trusts and all charitable entities which solicit funds in Illinois register with and report its financial operations annually to the Attorney General.

10. Since July 1, 1987 to the present, Defendants TELEMARKETING and TROIA have acted as professional fundraisers and solicited charitable donations from the public for Vietnow's charitable purposes through their own acts and in concert with others in an amount of at least $1.524 million, with Vietnow receiving only $224,000.00 (14.6%) in that period.

11. The aforesaid solicitations by TELEMARKETING were conducted purportedly under two contracts, the first made in 1984 and the second made in 1988, between Vietnow and TELEMARKETING, signed by TROIA, which both provide that TELEMARKETING would receive 85% of the gross receipts it collected from charitable solicitations in Vietnow's name. A copy of both contracts are

attached hereto as Group Exhibit 'B' and incorporated herein by reference.

12. Since August 22, 1989 through the present, the Defendants expanded their Vietnow fundraising efforts outside Illinois. Numerous "brokered fundraising" contracts were entered into between Vietnow, Defendant ARMET by TROIA and various out-of-State third-party professional fundraising persons and entities which, under these contracts, were also to perform fundraising on behalf of Vietnow N.H. in specific States other than Illinois. Such contracts provided that the out-of-State third-party professional fundraisers would raise the funds and receive 70% to 80%, that ARMET would receive 10% to 20% as a finder, and that Vietnow would receive only 10% of the gross receipts collected by the out-of-State third-party fundraisers. Copies of several third-party fundraising contracts between Defendant ARMET, Vietnow and third-party fundraisers are attached hereto as Group Exhibit 'C' and incorporated herein by reference.

13. TROIA negotiated these out-of-State contracts not only for ARMET but also for Vietnow, and in several instances TROIA incorporated new not-for-profit Vietnow local chapters in other States to implement and further the scheme described herein. Thus, TROIA acted as fiduciary for Vietnow, and could not bargain in good faith for Vietnow with himself on behalf of ARMET.

14. Upon information and belief, in several instances out-of-State fundraisers began raising funds before Vietnow had approved or received these contracts, before they were signed by Vietnow and before Vietnow was aware of fundraising activities in a particular State.

15. The Defendants solicited and received at least a total of $1,524,000.00 from the public pursuant to solicitations made on behalf of Vietnow during the period beginning

July 1, 1987 through December 31, 1989 and currently Defendants are collecting at least $50,000.00 per week on behalf of Vietnow, totaling an estimated $2.5 million per year.

16. Of the aforesaid $1,524,000.00 solicited and collected by TELEMARKETING on behalf of Vietnow between July 1, 1987 and December 31, 1989, Vietnow received only $224,000.00 (less than 15 per cent of the total amount solicited) while the Defendants received over $1,300,000.00. The out-of-State fundraising amounts are what Defendants have reported and an accounting is needed to determine if more was collected than reported.

17. Copies of financial information reports sworn to and provided by TROIA and TELEMARKETING for the period beginning July 1, 1987 and ending December 31, 1989 are attached hereto as Group Exhibit 'D' and incorporated herein by reference and establish the aforesaid amounts.

18. Certain proceeds of charitable solicitations for Vietnow by Defendant TELEMARKETING and its agents and third-party contractors were deposited in a bank account designated Vietnow at the 1st Chicago Bank of Oak Park, Oak Park, Cook County, Illinois.

19. The charitable donations collected under the ARMET third-party contracts were in certain instances deposited in accounts out of State. The percentage finder's fee portion payable to ARMET under the contracts was then also deposited into the same Vietnow account at the 1st Chicago Bank of Oak Park used by TELEMARKETING to deposit Vietnow contributions it collects.

20. ARMET had no bank account of its own, but deposited and commingled all of its alleged finder's fees into the same account used by TELEMARKETING for Vietnow contributions. ARMET is simply an alias of Defendants TROIA and TELEMARKETING to attempt to circumvent

reporting disclosure.

21. Section 1(d) of the Illinois Solicitation Act defines a professional fundraiser as follows:

> (d) "Professional fund raiser." Any person who for compensation or other consideration plans, conducts, manages, or carries on any drive or campaign in this State for the purpose of soliciting contributions for or on behalf of any charitable organization or any other person, or who engages in the business of, or holds himself out to persons in this State as independently engaged in the business of soliciting contributions for such purposes. A bona fide officer or employee of a charitable organization shall not be deemed a professional fund raiser unless his salary or other compensation is computed on the basis of funds to be raised, or actually raised.

(Ill. Rev. Stat. 1989, ch. 23, par. 5101(d).)

Section 6 of the same Act requires a "professional fund raiser" to register with the Attorney General and to provide a bond prior to solicitations, as follows:

> Section 6 (a). No person shall act as a professional fund raiser for a charitable organization required to register pursuant to Section 2 of this Act, or for any religious organization as described in Section 3 (a) of this Act before he has registered with the Attorney General or after the expiration or cancellation of such registration or any renewal thereof. Applications for registration and re-registration shall be in writing, under oath, in the form prescribed by the Attorney General. The applicant shall at the time of making application, file with, and have approved by, the Attorney General a bond in which the applicant shall be the principal obligor, in the sum of $5,000, with one or more corporate sureties licensed to do business in this State whose

> liability in the aggregate will at least equal such sum. The bond shall run to the Attorney General for the use of the State and to any person who may have a cause of action against the obligor of the bond for any malfeasance or misfeasance in the conduct of such solicitation; provided, that the aggregate limit of liability of the surety to the State and to all such persons shall, in no event, exceed the sum of such bond.

(Ill. Rev. Stat. 1989, ch. 23, par. 5106.)

22. TROIA for several years has registered TELEMARKETING as a professional fundraiser under the Illinois Solicitation Act and has filed reports.

23. Defendant TROIA, under the name ARMET and TELEMARKETING, contracted with third-party fundraisers to act as professional fundraisers for Vietnow. ARMET, under the contracts, receives up to 20% of the funds collected by out-of-State fundraisers as its fee. TELEMARKETING has contracted with at least 20 third party professional fundraisers, who are located in Illinois, solicit within Illinois and are receiving 50 to 70 percent of what they raise as a fee, but are not registered as professional fundraisers. Consequently, the Defendants have violated the Solicitation Act by using unregistered professional fundraisers.

24. ARMET's services for which fees were ostensibly earned were described to the Plaintiff by TROIA to be his activities for ARMET finding and contracting with the out-of-State fundraisers, establishing and registering Vietnow chapters in other States and conducting, coordinating and planning the out-of-State fundraising from ARMET'S base in Illinois; thus, ARMET and TROIA are professional fundraiser under the Illinois Solicitation Act.

25. Notwithstanding the foregoing, Defendant TROIA failed to register ARMET with the Attorney General as a

professional fundraiser and failed to inform the Attorney General of its existence until the Attorney General issued an administrative subpoena for certain books and records of Defendants TROIA and TELEMARKETING.

26. ARMET, although required to register, has never registered as a professional fundraiser, has not submitted a bond nor reported its operations to date.

27. Defendant TROIA knew of the need to register ARMET and the various other professional fundraisers he hired to raise funds for Vietnow, but he failed to register ARMET or to insure the others registered.

28. The Defendants employed and caused the other professional fundraisers and solicitors to solicit on behalf of Vietnow while not being registered with the Attorney General, agreeing to pay them 45% to 70% of the amount raised. A list of such persons and entities who were engaged in soliciting on behalf of Vietnow in Illinois is attached hereto as Exhibit 'E.' Those operating out-of-State are found on the contracts attached as Group Exhibit 'C'.

29. Defendants by their agents and third-party contractors made telephone solicitations on behalf of Vietnow representing to members of the public that the funds donated would go to further Vietnow's charitable purposes.

30. Upon making and completing telephone solicitations, Defendants through their agents would give solicitation materials to each donor who had made a charitable pledge. Said materials also represented to the donor that the donor's contributions would be used to help and assist Vietnow's charitable purposes. A copy of one example of materials used is attached hereto as Exhibit 'F'.

31. As a result of the foregoing activities the Defendants charged Vietnow professional fundraiser fees of

$1,300,000.00 out of the $1,524,000.00 raised during the period July 1, 1987 through December 31, 1989. According to Defendants' verified reports, of the $1,300,000.00 in professional fundraiser fees at least $984,000.00 was salaries and commissions to TROIA and the other natural-person fundraisers of Defendants.

32. Although fundraising does have genuine expenses and costs, the amounts charged for fees, salaries and commissions here by Defendants were excessive in amount and constituted an unreasonable use and waste of charitable assets.

33. By taking possession and control of said charitable funds upon the Defendants' representation to the public that the funds would be used for charitable purposes, the Defendants had a fiduciary duty to fairly and reasonably deliver said funds for Vietnow's purposes, but in charging the fee amounts they charged they breached their duty and defrauded the donating public.

34. By the foregoing acts and practices, the Defendants have engaged in a course and scheme of conduct whereby representations were made that a significant amount of each dollar donated would be paid over to Vietnow for its purposes while in fact the Defendants knew that under the contracts 15 cents or less of each dollar would be available to Vietnow for its purposes.

35. The Defendants by the foregoing acts and practices established a pattern of conduct where in fact the amount of funds being paid over to charity was merely incidental to the fund raising effort and, as a result, the representations made to donors were knowingly deceptive and materially false, constituted a fraud and were made for the private pecuniary benefit of Defendants and their agents.

36. Illinois law imposes common law fiduciary duties and responsibilities upon those collecting and holding money

for charity, including duties of loyalty and fair dealing and a duty to use the funds properly.

37. In the aforesaid fundraising campaign on behalf of Vietnow, the Defendants did not advise the donors that the campaign was being conducted pursuant to private for-profit contracts whereunder a negligible amount, or only 15%, of all funds raised would be given to Vietnow and used for its charitable purpose.

38. The totality of the foregoing, including the numerous solicitations, the similar results over several years of solicitations, the consistently high level of retention of private compensation by the Defendants and their agents, the consistently low level of overall charitable use of large amounts of donations, and the Defendants' failure to inform the donating public of the known minimal percentage of funds donated being made available for charitable use, establishes that a willful knowing fraud was perpetrated upon the public by Defendants.

39. The Defendants by their acts as alleged herein have breached their fiduciary duty and are unfit to solicit and receive charitable assets and should be barred from positions as fiduciaries of charitable assets.

40. Vietnow National, by agreement under its umbrella relationship, is to pay a percentage of its collected donated funds to the Illinois Vietnow State organization, Vietnow Illinois local chapters and other States' Vietnow organizations. These other Vietnow organizations have agreed to coordinate their fundraising with Vietnow National for their mutual benefit and to aid their mutual charitable causes.

41. The State and local Vietnow entities have entrusted to Vietnow National the stewardship of their joint fundraising, which fundraising has been done by the aforesaid activities of Defendants.

42. The Defendants, by their conduct of taking and paying excessive compensation and wasting Vietnow donations, have caused Vietnow's resources to be substantially diminished and has in turn resulted in less being available and paid to numerous local chapters in Illinois and the Illinois State chapter itself. The excessive and wrongful taking of donations by the Defendants has harmed Vietnow National, its affiliates' cause and the public as a whole.

43. The monies and fees paid to unregistered professional fundraisers and solicitors as alleged herein were payments not made in conformity with law and are self-dealing payments not permitted as an expense in equity.

44. Defendants are currently continuing to conduct the aforesaid solicitation campaigns, and Defendants and their agents are currently collecting $50,000.00 per week form the public on behalf of Vietnow of which Vietnow's share is less than 15%.

45. In addition to the fundraising they were doing on behalf of Vietnow N.H. as alleged herein, Defendants TELEMARKETING and TROIA also acted as professional fundraisers for and engaged in charitable solicitations or behalf of numerous other Illinois entities, including many that were never registered with the Plaintiff under the Illinois Solicitation Act, during the period between July 1, 1987 and December 31, 1989 and through the present, and have received millions of dollars' worth of contributions therefrom and retained much of that amount as fundraiser fees and expenses.

46. As a result of the ongoing conduct of the Defendants alleged herein, immediate and irreparable injury has occurred and is continuing to occur to the reputation of charity and the interests of the PEOPLE OF THE STATE OF ILLINOIS, for which there is no adequate remedy at

law.

47. Malice is the gist of this action.

WHEREFORE, the Plaintiff, the PEOPLE OF THE STATE OF ILLINOIS *ex rel.* ROLAND W. BURRIS, Attorney General of Illinois, prays that this Honorable Court enter an Order:

A. Finding and adjudging that the Defendants have breached their fiduciary duty to the PEOPLE OF THE STATE OF ILLINOIS and charity;

B. Directing Defendants TELEMARKETING ASSOCIATES, INC., ARMET, INC., and RICHARD TROIA to make a strict accounting of the assets, receipts and disbursements of the funds and assets collected on behalf of Vietnow for the period since July 1, 1987;

C. Surcharging the Defendants for such assets as the Court finds to have been misspent or misused, as well as for all assets for which the Defendants are unable to strictly account;

D. Surcharging the Defendants, in addition, for all proceeds, fees, and salaries paid to persons and entities who were required to have been disclosed to the Attorney General and registered with him as professional fundraisers and/or professional solicitors prior to solicitation pursuant to the Illinois Solicitation Act but were not;

E. Finding and adjudging that Defendant TROIA's failure to register ARMET as a professional fundraiser was an intentional violation of the Illinois Solicitation Act;

F. Preliminarily and permanently enjoining TELEMARKETING ASSOCIATES, INC., ARMET, INC., and RICHARD TROIA, and any person acting on their behalf or in concert or participation with

them, from soliciting or holding funds for charitable purposes within the State of Illinois;

G. Directing TELEMARKETING ASSOCIATES, INC., ARMET, INC., and RICHARD TROIA to pay the costs incurred in the investigation and prosecution of this cause; and

H. Granting such other relief as this Court deems just under the circumstances of this cause.

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* ROLLAND W. BURRIS, Attorney General of Illinois

/s/ Floyd D. Perkins
By: FLOYD D. PERKINS

FLOYD D. PERKINS #99000
MATTHEW D. SHAPIRO
Assistant Attorneys General
Charitable Trusts and
Solicitations Division
100 W. Randolph St., 12th Fl.
Chicago, Illinois 60601
Telephone (312) 814-2595

File Number 5369-550-7

STATE OF ILLINOIS

OFFICE OF
SECRETARY OF STATE

Whereas, ARTICLES OF INCORPORATION OF VIETNOW, NATIONAL HEADQUARTERS INCORPORATED UNDER THE LAWS OF THE STATE OF ILLINOIS HAVE BEEN FILED IN THE OFFICE OF THE SECRETARY OF STATE AS PROVIDED BY THE GENERAL NOT FOR PROFIT CORPORATION ACT OF ILLINOIS, IN FORCE JANUARY 1, A.D. 1944.

Now Therefore, I, Jim Edgar, Secretary of State of the State of Illinois, by virtue of the powers vested in me by law, do hereby issue this certificate and attach hereto a copy of the application of the aforesaid corporation.

In Testimony Whereof, I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois. at the City of Springfield, this 31st day of DECEMBER AD. 1984 and of the Independence of the United States the two hundred and 9TH

Jim Edgar
Secretary of State

SEAL

ARTICLES OF INCORPORATION

Requirements-Present 2 originally signed and fully executed copies in exact duplicate
For Inserts – Use White Paper – Size 8 ½ x 11
(Do Not Write in This Space)

Date paid 12-31-84

Filing Fee $50.00

Clerk
TO: JIM EDGAR, Secretary of State

We, the Incorporators being natural persons of the age of twenty-one years or more and citizens of the United States, for the purpose of forming a corporation under the "General Not For Profit Corporation Act" of the State of Illinois, do hereby adopt the following Articles of Incorporation:

Article 1. The name of the corporation is: VIETNOW, National Headquarters

Article 2. The name and address of the initial registered agent and registered office are:

Registered Agent Oliver W. Nelson (Attorney)
First Name Middle Name Last Name

Registered Office 724 Broadway Street (Do Not Use P.O. Box)
Rockford IL 61108 Winnebago
City Zip Code County

Article 3. The duration of the corporation is ☒ perpetual OR ___ years.

Article 4. The first Board of Directors shall be Seven in number, their names and addresses being as follows:
(Not less than three)

Address
Director's Names Number Street City State

Bruce Scott 207 Ridgeview Ave. Rockford, Ill. 61107

Gary S. Willard 967 Nottingham Lane Crystal Lake, Ill. 60014

Ron Coselman 1356 S. Broadway Montgomery, Ill. 60538

* Plus the four names on the back [OMITTED]

Article 5. The purposes for which the corporation is organized are:

a. to be an organization of War veterans;

b. to act as a central focus point for all VIETNOW chapters, keeping the lines of communications open to all chapters and overseeing the general operation of the organization;

c. to help increase community awareness of the problems and readjustments encountered by the Vietnam veteran and his family;

d. to help or assist in the helping of solving the unique physical, social and psychological problems of the Vietnam veteran; also to establish programs within the community concerning substance abuse, family services, and employment;

e. to demonstrate to our community that Vietnam veterans are a vital resource;

(continued on attached page)

Article 6. Other provisions (Please use separate page):

f. No part of the net earnings of the corporation shall inure to the benefit of, or be distributable to, its members, trustees, officers, or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth above. Notwithstanding any other provisions of these Articles, the corporation shall not carry on any other activities not permitted to be carried on (a) by a corporation exempt from Federal income tax under Section 501 (c) (3) or 501 (c) (19) of the Internal Revenue code of 1954 (or the corresponding provision of any future United States Internal Revenue Law) or (b) by a corporation, contributions to which are deductible under Section 170 (c) (2) or 170 (c) (3) of the Internal Revenue code of 1954 (or the corresponding provision of any future United States Internal Revenue Law);

g. Upon the dissolution of the corporation, the Board of Directors shall, after paying or making provision for the payment of all of the liabilities of the corporation, dispose of all of the assets of the corporation exclusively for the purposes of the corporation in in such manner, or to such organization or organizations organized and operated exclusively for charitable, educational, religious, or scientific purposes as shall at the time qualify as an exempt organization or organizations under Section 501 (c) (3) or as shall qualify as an exempt organization or organizations under Section 501 (c) (19) of the Internal Revenue Code of 1954 (or the corresponding provision of any future United States Internal Revenue Law), as the Board of Directors shall determine. Any such assets not so disposed of shall be disposed of by the Court of the county in which the principal office of the

corporation is then located, exclusively for such purposes or to such organization or organizations, as said Court shall determine, which are organized and operated exclusively for such purposes.

We the incorporators declare that we have examined the foregoing Articles of Incorporation and that the statements contained therein are, to the best of our knowledge and belief, true, correct and complete. Executed this _ 27th day of December, 1984.

(Signatures must be in ink. Carbon copy, Xerox or rubber stamp signatures are not acceptable.)

Signatures and Names (Not less than three)	Post Office Address
1. /s/ Signature Lamont C. Gaston Name (please print)	1. RR #3 Lake LaDonna Street Oregon, Ill. 61061 City/Town State Zip
2. /s/ Signature Michael J. White Name (please print)	2. 5438 Dale Ave. Street Loves Park, Ill. 61111 City/Town State Zip
3. /s/ Signature Daniel W. Jensen Name (please print)	3. 3487 Shelburne Dr. Street Rockford, Ill. 61109 City/Town State Zip
4. /s/ Signature Patrick T. Derry Name (please print)	4. 6343 Bryce Lane Street Cherry Valley Ill. 61016 City/Town State Zip
5. _____ Signature _____ Name (please print)	5. _____ Street. _____ City/Town State

Zip

The registered agent cannot be the corporation itself.

The registered agent may be an individual, resident in this State, of a domestic or foreign corporation, authorized to act as a registered agent.

The registered office may be, but need not be, the same as its principal office.

File #_____

Form NP-29

ARTICLES OF INCORPORATION

under the

GENERAL NOT FOR PROFIT

CORPORATION ACT

OF

_____

FILED
DEC 31 1984
JIM EDGAR
SECRETARY OF STATE

PAID
JAN 02 1985

SECRETARY OF STATE
CORPORATION DEPARTMENT
SPRINGFIELD, ILLINOIS 62756
TELEPHONE (217) 782-6961

(These Articles Must Be Executed and Filed in Duplicate)
Filing Fee $50.00

Telemarketing associates, inc.

"the professionals of advertising & fundraising"

AGREEMENT

This Agreement is hereby made this 1st day of August, 1988, by and between Telemarketing Associates, Inc. (hereafter referred to as THE PUBLISHER), and VietNow, National Headquarters, (hereinafter referred to as THE SPONSOR). This Agreement shall run for five (5) consecutive years, beginning as of the 1st day of August, 1988 and ending on the 30th day of July, 1993.

In consideration of the mutual covenants contained herein it is now therefore agreed that THE SPONSOR employs the services of THE PUBLISHER to conduct advertising by marketing advertising space and to publish THE SPONSOR'S publication (hereinafter, the "Marketing Program") and to conduct such other related activities pertaining to increasing public awareness and financial support for the organization, with the following agreements, requirements, limitations and statements of responsibility.

THE PUBLISHER agrees:

(a) To supply all marketing personnel, and pay all relative expense such as salaries and commissions.

(b) To annually produce, publish, edit and pay all costs for an advertising magazine (the "Ad Book"), including publication of a table of contents, index of advertisers and sequentially numbered pages, the intent being to supply a publication to increase the community awareness of THE SPONSOR and a forum of advertising to the business communities.

At least 2,200 copies of the Ad Book are to be provided to THE SPONSOR in 1988, and the exact number of copies of the Ad Book is to be provided to THE SPONSOR in 1989, 1990, 1991, 1992 and 1993 is to be mutually agreed upon in the form of written permission by both parties, but it shall never be less than the prior year.

(c) To market magazine listings (booster program) for night sales to residences.

(d) To pay all costs for an office and phones, including the cost of installation, incurred by THE PUBLISHER, in conjunction with the Ad Book.

(e) To conduct an efficient and professional marketing program, promote goodwill on behalf of THE SPONSOR and enhance good public relations through THE PUBLISHER'S sales techniques.

(f) The Marketing Program will be conducted through the state of Illinois, as well as nationally with offices in other states.

(1)

2924 north river road river grove, Illinois
60171
(312) 456-2292

(g) In the delivery of the program service message, THE PUBLISHER agrees to solicit individual donations and advertising for the Ad Book. For accounting purposes, THE PUBLISHER agrees to maintain separate records to clearly and properly allocate income attributable to the solicitation of donations only, and income which is attributable to advertising sales, in accordance with applicable state and federal regulations.

(h) THE PUBLISHER agrees to be solely responsible for any and all expense incurred in the creation of the program activity hereinabove described, and to hold THE SPONSOR harmless therefrom.

(i) THE PUBLISHER agrees that throughout the term of this Agreement that neither nor any affiliate will it will not enter a contract with or otherwise provide advertising or fund raising services to any veterans' organization without the express written permission of THE SPONSOR.

(j) THE PUBLISHER agrees to permit THE SPONSOR'S officers to visit and view its offices and facilities during business hours, upon reasonable notice by THE SPONSOR (which notice may be given by telephone).

(k) THE PUBLISER agrees to promptly provide THE SPONSOR with a copy of any financial reports THE PUBLISHER files with any governmental department or agency relating to THE PUBLISHER'S general activities or to its activities under this Agreement.

THE SPONSOR agrees:

(a) To cooperate and assist THE PUBLISHER in all reasonable and necessary terms. To provide THE PUBLISHER with a letter signed by an officer of THE SPONSOR thanking interested advertisers or donors and providing a program service message.

(b) That THE PUBLISHER has full authority to use the good name of THE SPONSOR during the sales

campaign, with the exception that THE PUBLISHER must secure permission from THE SPONSOR to use the VietNow logo or letterhead.

(c) THE SPONSOR agrees that throughout the term of this Agreement THE SPONSOR will not use the services of any other professional fund raiser to solicit support without written permission from the publisher. It is the express intent to create an exclusive agreement between both parties.

(d) THE SPONSOR acknowledges and agrees that a portion of the consideration it is receiving for entering into this agreement with THE PUBLISHER is the existing L.W. S.R. list which is being provided at no cost to the sponsor. Said list has been developed by THE PUBLISHER over a period of years, and THE SPONSOR hereby agrees that any additions or deletions which may result from this Marketing Program, as well as the R.V. list itself, shall remain sole and exclusive and exclusive property of THE PUBLISHER.

PARTIES AGREE:

(a) THE PUBLISHER shall ask potential donors and advertisers for all payments to be made by check or money order, payable to THE SPONSOR, and shall endeavor to accept payment in that form. However, if the payor insists upon paying in cash, such payment shall be accepted by THE PUBLISHER or THE SPONSOR (whichever receives it) by the recipient concurrently obtaining from the payor a copy of the receipt for such payment, countersigned by the payor. THE PUBLISHER shall promptly deliver all checks, money orders, cash payments and accompanying receipts it receives in the name of or for THE SPONSOR to such person, or have them deposited in such bank account, as may be jointly designated by THE SPONSOR'S president and treasurer from time to time.

(b) THE PUBLISHER shall, as its total compensation for all efforts and costs associated with the Marketing Program, be allocated be allocated 85% of the gross collections from the Marketing Program, and the sponsor shall be allocated 15% of the gross collections. Gross collections received by THE SPONSOR are to be divided on a weekly basis, and THE PUBLISHER paid its share of collections by THE SPONSOR on that same basis. For this purpose, THE SPONSOR will be deemed to have received collections when such fund become available in its bank account, provided that THE SPONSOR has promptly deposited all checks and money orders it has received. THE PUBLISHER and THE SPONSOR agree THE SPONSOR needs more frequent and more detailed reports of the progress of the marketing program. THE PUBLISHER therefore agrees to provide The SPONSOR with information concerning the amount and geographic source of pledges, orders, collections, expenses and the balance due THE PUBLISHER therefore agrees to provide THE SPONSOR with information concerning the amount

and geographic source of pledges, orders, collections, expenses and the balance due THE PUBLISHER, such information to be provided on a quarterly basis within one month after the end of each calendar quarter. To this end, the parties agree that on or before September 30, 1988, they will determine the exact details of a mutually satisfactory reporting system for such matters, and will each devote their best efforts to that goal.

(c) No later than 60 days prior to the publication date for the Ad Book, THE PUBLISHER shall submit a final proof of the Ad Book to THE SPONSOR for approval. THE SPONSOR shall have 30 days from the date of receipt to either approve or object to the proposed copy, and to submit changes or comments. If no objection or comments are received within such 30 days, THE PUBLISHER shall be entitled to consider the proof approved for final printing.

That for the purpose of this Agreement, both copies of said Agreement, when signed and accepted by both parties shall be construed as a legal and binding contract.

(d) That with regard to the Ad Book, THE PUBLISHER shall leave for THE SPONSOR twelve (12) pages whereby THE SPONSOR might supply copy of its choosing, provided that it be submitted at least sixty (60) days prior to publication.

(e) THE PUBLISHER assumes no responsibility for and shall not be liable for any inability to conduct the Marketing Program due to labor strikes, labor trouble, flood, fire, accident, acts of God or any other causes beyond its reasonable control.

(f) Before extending the Marketing Program to any state, THE PUBLISHER shall notify THE SPONSOR of its intention to take such action, and shall provide THE SPONSOR with an opinion of legal counsel that it has complied with all legal requirements for making charitable solicitations

and conducting an advertising campaign such as the Marketing Program in such state and local agencies in such state. Provided that THE PUBLISHER has provided THE SPONSOR with reasonable notice of its intent to extend the Marketing Program to another state, THE SPONSOR shall comply with all legal requirements of such jurisdiction to permit THE PUBLISHER to conduct an opinion of legal counsel and a copy of all documentation filed with state and local agencies to such effect within the deadline set by THE PUBLISHER. The parties agree that with respect to the states of Illinois and Wisconsin, they have each informed the other of their respective status, and THE PUBLISHER and THE SPONSOR each represent to the other that it is not legally barred from conducting the marketing Program in either state.

(g) THE PUBLISHER acknowledges that THE SPONSOR has a great interest in maintaining good relations with each of its chapters, and that such chapters want advance notice of THE PUBLISHER'S solicitations in their areas. To that end, THE SPONSOR will provide THE PUBLISHER with maps showing the location of every VietNow chapter. At least one month before beginning the Marketing Program in the area of any chapter, THE PUBLISHER will inform THE SPONSOR in writing and request its approval. THE SPONSOR shall respond to such request within 14 days thereafter, any may withhold approval based on the reasonable objections of the affected chapter.

(h) This Agreement is governed by the laws of the state or Illinois and should either party hereto institute a legal action of any kind concerning the agreement, it is mutually agreed said action will be instituted in Cook County, Illinois.

(i) THE SPONSOR shall; conduct fundraising and campaigns without the use of a professional fundraiser provided that same is not carried on at the same time in the same Geographic area as THE PUBLISHER'S program for THE SPONSOR. THE SPONSOR may also conduct fundraising campaigns with the use of a professional fund raiser other than THE PUBLISHER upon receipt of THE PUBLISHER'S written approval, provided THE PUBLISHER'S provision of such approval with respect to any one fund raising event or campaign shall not waive any of the other provision of this Agreement.

(j) In the event the Marketing Program is not renewed through mutual agreement by and between the parties hereto for an additional term, then in that event, THE SPONSOR agrees that after the termination of this Agreement and for a period of one (1) year THE PUBLISHER shall have a first right of refusal to match any other offer THE SPONSOR may seek or obtain to conduct a like or similar program. In the event THE SPONSOR shall receive and agree to such an offer from a third party, then in that event, THE SPONSOR shall give notice of same to THE PUBLISHER in writing, together with a copy of the bone fide contract offer. This notice shall be sent by certified mail, return receipt requested to: Telemarketing Associates, Inc., 2924 N. River Rd., River Grove, IL 60171, and Errol Copilevitz, 1812 Commerce Tower, 911 Main Street, Kansas City, MO 64105. Upon receipt of said written offer, THE PUBLISHER shall have ten (10) days to accept or reject same in writing.

(k) THE PUBLISHER agrees that the Marketing Program is to be conducted in an efficient, professional and courteous manner, with the protection of THE SPONSOR'S reputation and

goodwill being of primary concern. To this end, THE PUBLISHER agrees that only individuals having suitable familiarity with THE SPONSOR'S policies, goals and interests are to be utilized in the Marketing Program. Furthermore, promptly upon receiving written request from THE SPONSOR, THE PUBLISHER shall submit for THE SPONSOR'S approval a transcript of any "pitch" and all other advertising and solicitation materials used by its independent contractors in connection with the Marketing Program. If the SPONSOR objects the PUBLISHER'S use of any "pitch" or other solicitation or advertising materials or methods, THE PUBLISHER shall immediately cease using the material or method objected to, and both parties shall use their best efforts to devise a mutually satisfactory substitute.

(l) The parties hereto mutually acknowledge and agree that the Marketing Program under this Agreement includes the sale of advertising, the solicitation of donations and the distribution of educational and program service message. It is further acknowledged and agreed that the expense of the public operations campaign and the delivery of the program service message, shall be paid out of the proceeds raised by the sale of advertising from the Ad Book. Other costs which shall be allocated to the Marketing Program will include the availability and use of facilities and training, computer created data, printing, accounting, handling, mailing and other expenses related thereto.

(m) The parties hereto acknowledge and agree that the marketing program combines the activity of fundraising with the program service of THE SPONSOR. The program service of THE SPONSOR shall be incorporated in written form and included to each person expressing an interest in THE SPONSOR, provided that said mailing shall not result in increased postage rates for THE PUBLISHER, UNLESS REIMBUSED by THE SPONSOR. In addition, thereto, the program service of THE SPONSOR may be set forth in the editorial content provided for publication in the Ad Book as THE SPONSOR'S discretion. In accordance with Statement of Position 37-2, issued by the American Institute of Certified Public Accountants on August 21, 1987 the parties jointly agree that the portion of expenses attributable to program service and the delivery of program service message, shall be allocated to the program service.

(n) Should either party hereto claim that the other is in default under the terms and conditions hereof, then the party claiming default shall be obligated to give notice in writing, specifying the nature of the default. The party then in default shall either correct the default, or commence correction with thirty (30) days of notice. If the party allegedly in default does not cure same, the party giving notice of default may terminate the Agreement and seek such damages and other remedies as may be available at common law or in equity. In the event there shall be a dispute of whether a default does in fact exist, this matter will be submitted to a representative of the American Arbitration Association in Chicago, Illinois, with the finding thereof to be binding upon both parties.

(o) Notice by the parties shall be sent to the addresses set forth below until such addresses are changed by written notice.

(p) To aid THE SPONSOR in its acquisition of new offices, THE PUBLISHER hereby pledges to contribute $2,000 to THE SPONSOR on or before the date THE SPONSOR moves to such offices

Lamonte C. Gaston, President, VietNow National
1302 S. Harmony Rd, Oregon, IL 61061

Sam Russo, Vice President, VietNow National
1 S. 433 Fairview, Lombard, IL 60148

Richard Troia, President, Telemarketing Asso. Inc.
2924 N. River Rd., River Grove, IL 60171

This Agreement signed and beginning on July 22 1988 – as agreed. R.T. L.C.G SR

Approved by Attorney

_____
Reid Mandel

TELEMARKETING ASSOCIATES INC.
811 A. N. Harlem Ave.
Suite 2 N
Oak Park, IL 60302
(312) 383-9122

AGREEMENT

Agreement is hereby made this 4 day of December, 1984 by and between Telemarketing Associates, Inc. (hereafter referred to as THE PRODUCER) and VietNow-Vietnam Veterans Asso. (hereafter referred to as THE SPONSOR).

In consideration of the mutual covenants contained herein it is now therefore agreed that THE SPONSOR employs the services of THE PRODUCER to conduct advertising by marketing advertising space in THE SPONSOR'S magazine with regard to the following agreements, requirements, limitations and statements of responsibility. This contract is for five straight years ending on December 4, 1989.

THE PRODUCER agrees:

(a) To supply all marketing personnel.
(b) To produce, publish, edit and pay all costs for 1500 advertising magazine, including publication of a table of contents, index of advertisers, and sequentially numbered pages, the intent being to supply a publication of advertising value.
(c) To pay all costs of an office and phones, including the cost of installation, incurred by THE PRODUCER in conjunction with THE SPONSOR'S publication.
(d) To share with THE SPONSOR to the extent of 15% of the gross collections from the campaign.

(e) To conduct an efficient and professional marketing program, promote goodwill on behalf of THE SPONSOR and enhance good public relations through THE PRODUCER'S sales technics.

THE SPONSOR agrees:

(a) To produce all required permits by state or local laws or ordinances for the purpose of conducting this advertising sales campaign.
(b) To give THE PRODUCER its cooperation and the cooperation of its members and affiliates during the course of this campaign.
(c) That THE PRODUCER has full authority to use the good name of THE SPONSOR during the sales campaign.
(d) To share with THE PRODUCER to the extent of 85% of the gross collections in the sales campaign for THE SPONSOR'S publication.
(e) Cooperate and put forth an honest and sincere effort to make the sales campaign a success financially and otherwise.

BOTH PARTIES agree:

(a) That all checks or money orders shall be made payable to THE SPONSOR.

(b) That when all copy is photo-ready for printing THE PRODUCER shall submit such copy to THE SPONSOR for the purpose of final editing and proof reading.

(c) That for the purpose of this agreement, both copies of said agreement, when signed and accepted by both parties shall be construed as a legal and binding contract.

(d) That with regard go the program book, THE PRODUCER shall leave for THE SPONSOR twelve (12) pages whereby THE SPONSOR might supply ad copy provided that it be submitted at least sixty (60) days prior to publication date.

(e) THE PRODUCER assumes no responsibility for and shall not be liable for any inability to conduct the campaign due to strikes, labor trouble, flood, fire, accident, acts of God, or any other cause beyond its reasonable control.

(f) That weekly a settlement of amount due each party in the percentages indicated above shall be made.

(g) That THE PRODUCER shall publish said magazine within sixty (60) days of receivement of final ad copy. That THE SPONSOR will in turn supply THE PRODUCER with THE SPONSOR'S final ad copy, allowing sixty (60) days from date received for magazine completion.

This agreement is signed in duplicate on the day and year first written above by a duly authorized representative of both parties.

_____/s/_____
Richard Troia, President

_____/s/_____
Lamont Gaston, President

[ADDITIONAL EXHIBITS OMITTED]

ARMET PUBLISHING, INC

AGREEMENT

THIS AGREEMENT, made and entered into this 27th day of August, 1990, by and between VietNow National (hereinafter referred to as "VietNow") and Armet Publishing Company, Inc., an Illinois Corporation (hereinafter referred to as "Publisher"), and World Wide Communications (Somerville, MA) a duly registered professional solicitor (hereinafter referred to as "Agency"). This contract beginning on the 27th day of August, 1990, terminating on the 27th day of August, 1991.

WHEREAS, the parties hereto are desirous of entering into an agreement that will result in a public awareness and sales campaign being conducted by and on behalf of VietNow by Agency with a quarterly publication to be created and published by the Publisher.

WITNESSETH:

For and in consideration the mutual covenants herein contained, the sufficiency of which is acknowledged as evidenced by the signatures of the parties hereto, it is mutually agreed as follows:

1. CONDUCT OF ADVERTISING AND PUBLIC AWARENESS CAMPAIGN: Using its expertise, Agency agrees to contact the local population for the purpose of providing information about VietNow and at the same time to solicit advertising in a quarterly publication to be created by VietNow and the Publisher. Agency shall be solely responsible for obtaining the work force the facilities and training them to provide the information and take the orders as may be appropriate Agency assumes full responsibility for their own license/permits, office rental

and expense, wages and commissions as well as taxes, postage and any and all other incidentals necessary to engage in general program of contacting individuals and businesses concerning advertising in the quarterly periodical and providing information about VietNow. Agency shall receive ***% of the gross proceeds under $1000 total per week, and ***% over $1000 total on a weekly basis as total compensation, including costs that may be incurred for its efforts.

2. SALES PRESENTATIONS: Agency agrees to register and bond as well as show proof of same to VietNow. In addition thereto, all sales scripts utilized will be approved in advanced.

*** 72% with ads
*** 75% without ads (donations ONLY)

2924 N. River Road River grove, IL 60171

3 .NULLIFICATION: This agreement may be nullified by either party at any time upon written notice. In the event that this agreement shall be nullified by Publisher and/or VietNow, the professional solicitor is still entitled to commissions and all sales collected or sold for the account as or prior to the effective date of nullification.

4. OBLIGATION OF VIETNOW: VietNow agrees to cooperate with Agency in the public awareness and sales campaign as may be appropriate.

5. . PERIODICAL PUBLICATION: The Publisher does hereby agree to publish such periodicals as may be mutually agreed by and between VietNow and the Publisher on a timely basis and in addition thereto to perform the following functions, to wit: Development of public relations materials; layout, design and update of decals and stickers; layout and design of invoices, letters and other company materials, the typesetting layout and design of quarterly publication; and a coordination of editorial content supplied by VietNow as to insure that the editorial content of any publication shall be no less than thirty percent of all total pages. Further, the Publisher agrees to provide publications of first class quality with no less than two color front page display. VietNow agrees to pay to the Publisher ____% of the gross advertising revenue that is created for all services to be performed as noted above.

6. OBLIGATIONS OF PUBLISHER: Publisher agrees to maintain a live nationwide 800 number for individuals to call, and all calls will be responded to and information shall be provided upon request.

7. ALLOCATION OF JOINT EXPENSES: The parties hereto mutually acknowledge and agree that the opportunity to combine the public awareness campaign with the sale of advertising for a quarterly newspaper publication is a major inducement to VietNow to enter into this agreement. These expenses, in accordance with acceptable accounting procedures is set out in statement of position paper 87-2 as issued by the AICPA, may be allocated between these functions. It is contemplated that a fair allocation at the time of entry into this agreement will be to allocate one-third of the expense incurred thereby creating the equivalent of an additional twenty-three and one-third percent benefit to VietNow.

8. RECORDS REPORTING AND BANKING: Proceeds from all gross sales shall be deposited in a bank account in the name of VietNow by representatives of Agency. All financial records will be maintained in accordance with state statute an will be produced upon demand to VietNow or its designated representative. Both VietNow and the Publisher shall have the right to audit the books and records to insure that all sale proceeds have been accounted for by Agency.

9. GEOGRAPHICAL AREAS: Agency is hereby licensed to act as Publisher representative and licensee for the purpose of offering and selling advertising space in the VietNow National publication with the following geographical area(s) and/or phone area code(s):
To include, but not limited to, the following areas:

Maine, New Hampshire, Vermont, Orange County and San

Francisco California Areas, Lancaster County, PA

Agency agrees not to solicit any individual, organization or entity (hereinafter: persons located outside of the named geographical area(s) and/or phone area code(s), the business of which is national in scope located within the

above geographical area(s). What manufacturer fall within this definition will be determined solely be Publisher. Such list may be amended by Publisher at any time, effective two (2) days after Publisher mails such amendment to Agency by Certified Mail, return receipt requested. Agency acknowledges that he will receive no commission on any sale to any party described in this paragraph, nor will such sale be considered Agency's revenue for any purpose under this agreement.

10. ENTIRE AGREEMENT: This agreement contains the entire agreement by and between the parties and all prior understandings are merged herein. Any amendments must be in writing and signed by all the parties hereto.

11. DEFAULT: Any claim of default must be given in writing specifying the claim and providing the steps required to cure such default with the party allegedly in default being given 48 hours to cure. In the event of an alleged breach, VietNow is granted the right to require same to be submitted to binding arbitration in Chicago, Illinois.

IN WITNESS WHEREOF, each of the parties hereto have executed this agreement on the day and year first written above.

VIETNOW, NATIONAL HEADQUARTERS

By: Lamont C. Gaston /s/

ARMET PUBLISHING COMPANY, INC.

By: Richard Troia /s/
9/89 Newspaper Contract

[ADDITIONAL EXHIBITS OMITTED]

THIS MUST BE FILED BY APRIL 30, 1990

PROFESSIONAL FUND RAISER ANNUAL FINANCIAL REPORT

NEIL F. HARTIGAN
Attorney General, State of Illinois

FILE AT: Attorney General's Office, Charitable Trust, 12th Floor, 100 W. Randolph, Chicago, IL 60601
GENERALINSTRUCTIONS (FURTHER INSTRUCTIONS AT END OF FORM)
PLEASE TYPE OR PRINT IN BLACK INK
A. RESPOND TO ALL ITEMS ON THIS FORM
B. CHANGES OR ADDITIONS TO THE INORMATION IN THIS STATEMENT MUST BE SUBMITTED IN THIS FORMAT.
C. ANNUAL REPORT CHECK ONE PREPARED ON AN ACCRUAL BASIS (_) PREAPRED ON A CASH BASIS (X) OR PREPARED BY ANOTHER METHOD (_) IF PREPARED BY ANOTHER METHOD EXPLAIN
LEGAL
NAME
TELEMARKETING ASSOCIATES, INC.
YEAR ENDED JUNE 30 1990 AS
MAILPFR# 02-0288 . 0238
ADDRESS
2924 N. RIVER ROAD FEDERAL ID NUMBER
CITY, STATE 36 - 3191270
ZIP CODE
RIVER GROVE, IL 60171
PHONE # (708) 456-2292

REPORT IS FOR FISCAL PERIOD BEGINNING JANUARY 1, 1989 AND ENDING DECEMBER 31, 1989

CHARITIES FOR WHOM FUNDS WERE RAISED

	(A) AMOUNT TO CHARITY	(B) SOLICITATION EXPENSES	(C) TOTAL AMOUNT RAISED	(D) % - (A/C)
LOMBARD PROF. FIREFIGHTERS	964.11	3602.47	4591.00	21%
ELGIN F.O.P.	9874.00	39230.08	49370.00	20%
DISABLED & RETIRED FIREFIGHTERS	14691.65	76611.83	91822.80	16%
VIETNOW NATIONAL	96523.15	543281.84	643487.66	15%
VIETNOW NATIONAL	7909.78	70708.68	79097.76	10%
POLICE YOUTH & ATHLETIC ASSOC.	1029.00	4088.29	5145.00	20%

SCHAUMBURG PROF. FIREFIGHTERS	10273.92	30614.23	41095.67	25%
SCHAUMBURG POLICE F.O.P. LODGE #71	15710.84	58704.76	74813.54	21%

TOTAL FOR ALL CHARITABLE FUNDRAISING BY PER:

TOTAL NUMBER OF CHARITIES BEING REPORTED:

Note Verification must be by the Corporate President, a General Partner or the Sole Proprietor.

STATE OF ILLINOIS SS AFFIDAVIT

COUNTY OF COOK

I RICHARD TROIA, under penalty of perjury and being sworn on oath said that on (circle one ___) the corporate president, a general partner or the sole proprietor of the registered professional fundraiser.
Name of PFR) TELEMARKETING ASSOCIATES, INC., have read this annual report including all attachments and personally know the contents thereof to be true and such is stated herein and filed with the Illinois Attorney General for the purpose of having the people of the State of

Illinois rely, thereupon I hereby further authorize and agree to submit myself and the registrant hereby the jurisdiction of the State of Illinois.

Richard Troia /s/

Subscribed and sworn to
before me this 17th, day of Sept, 1990.
/s/ MaryAnn Kochan

THIS MUST BE FILED BY APRIL 30, 1990

PROFESSIONAL FUND RAISER ANNUAL FINANCIAL REPORT

NEIL F. HARTIGAN
Attorney General, State of Illinois

FILE AT: Attorney General's Office, Charitable Trust, 12th Floor, 100 W. Randolph, Chicago, IL 60601
GENERAL INSTRUCTIONS (FURTHER INSTRUCTIONS AT END OF FORM)
PLEASE TYPE OR PRINT IN BLACK INK
A.
RESPOND TO ALL ITEMS ON THIS FORM
B.
C. ANNUAL REPORT CHECK ONE PREPARED ON ACCRUAL BASIS (_) PREPARED ON A CASH BASIS (_) OR PREPARED BY ANOTHER METHOD (_) IF PREPARED BY ANOTHER MTOHOD EXPLAIN

LEGAL NAME REGISTERED FOR FISCAL TELEMARKETING ASSOCIATES, INC.
MAIL ADDRESS 2924 N. RIVER ROAD
CITY, STATE
ZIP CODE RIVER GROVE, IL 60171

YEAR ENDED JUNE 30 1990 AS
PFR# 02-0288 . 0238
FEDERAL ID NUMBER
36 – 3191270

PHONE #
PHONE # (708) 456-2292

REPORT IS FOR FISCAL PERIOD BEGINNING JANUARY 1, 1989 AND ENDING DECEMBER 31, 1989

CHARITIES FOR WHOM FUNDS WERE RAISED

	(A) AMOUNT TO CHARITY	(B) SOLICITATION EXPENSES	(C) TOTAL AMOUNT RAISED	(D) % - (A/C)
F.O.P. # 20 CORRECTION OFFICERS	1939.27	17335.91	19392.69	10%
DU PAGE COUNT SHERIFF'S POLICE	57517.63	202553.13	261443.78	22%
HOFFMAN ESTATES POLICE F.O.P. #40	10319.26	40999.10	51596.28	20%
ELK GROVE FIREFIGHTERS ASSN.	7758.35	27321.69	35265.24	22%
HARVEY PATROLMEN'S ASSOCIATION	2538.46	8939.40	11538.46	22%
LOMBARD POLICE BENEVOLENT AND PROTECTIVE ASSOCIATION	7249.22	25528.73	32951.00	22%

COOK COUNTY SHERIFF POLICE	60382.57	239904.06	301912.83	20%
ADDISON F.O.P.	13184.66	33675.13	47088.06	28%

TOTAL FOR ALL CHARITABLE FUNDRAISING BY PER: 317,869.87
1,423,099.33
1,750,611.77

TOTAL NUMBER OF CHARITIES BEING REPORTED:

Note Verification must be by the Corporate President, a General Partner or the Sole Proprietor.

STATE OF ILLINOIS

COUNTY OF COOK

STATE OF ILLINOIS SS AFFIDAVIT

COUNTY OF COOK

I RICHARD TROIA, under penalty of perjury and being sworn on oath said that on (circle one ___) the corporate president, a general partner or the sole proprietor of the registered professional fundraiser.
Name of PFR) TELEMARKETING ASSOCIATES, INC.
, have read this annual report including all attachments and personally know the contents thereof to be true and such is stated herein and filed with the Illinois Attorney General for the purpose of having the people of the State of Illinois rely, thereupon I hereby further authorize and agree to submit myself and the registrant hereby the jurisdiction of the State of Illinois.
Richard Troia /s/

Subscribed and sworn to
before me this 17th, day of Sept, 1990.
/s/ MaryAnn Kochan

REPORT OF INDIVIDUAL FUNDRAISING CAMPAIGN

VIETNOW NATIONAL

CAMPAIGN BEGINNING 6-30-89 ENDING 6-30-90

ADDRESS: 3008 Kilburn Ave.

CITY, STATE ZIP CODE: Rockford, Illinois 61103

CHARITY INFORMATION

CO # 01 _____
NAME OF CHARITY'S CONTACT PERSON Lamont Gaston
NAME TELEMARKETING ASSOCIATES, INC.
PFR# 02-02880238
NATURE OF FUNDAISING ACTIVITY: PHONE SOLICITATION

A. AMOUNT RECEIVED BY THE CHARITABLE ORGANIZATION	$96,523.
$96,523.	
B. EXPENSES PER CHARITY	
1. PROFESSIONAL FUNDRAISER FEE	
2. SOLICITOR COMPENSATION	382,470.42
3. SALARIES & RELATED	52,155.06
4. PRINTING	7,605.95
5. POSTAGE & OFFICE	27,164.09

6. TELEPHONE	27,164.09	
7. RENT & UTILITIES	12,495.48	
8. SUPPLIES	12,495.48	
9. TRAVEL & AUTO INSURANCE		2,716.41
		3,259.69
10. DEPRECIATION & INTEREST ADVERTISING & PROMOTION	3,259.69	
		5,432.82
11. PROFESSIONAL FEES		
REPAIRS & MAINTENANCE		7,062.66
2,716.41		
12 LICENSES, DUES & PERMITS	543.28	
	TOTAL	
EXPENSES (PER CHARITY):		
	$ 543,281	

C. TOTAL AMOUNT RAISED $ 643,487

D. PERCENTAGE OF FUNDS RECEIVED BY CHARITY (A DIVIDED BY C) $15%

F. WHERE WERE THE FUNDS DEPOSITED?

1ST CHICAGO BANK OF OAK PARK

G. WHO (CHARITY OF PER) HAS SIGNATURE CONTROL OF THE ACCOUNT(S) LISTED ABOVE? PER

H. ATTACH A SCHEDULE EXPLAINING IN DETAIL HOW EXPENSES LISTED ABOVE ARE ALLOCATED BETWEEN FUNDRAISING CAMPAIGNS?

RECEIVED BY THE PER.

WE, THE UNDERSIGNED, DECLARE AND CERTIFY THAT WE HAVE EXAMINED THIS REPORT INCLUDING ALL THE SCHEDULES AND STATEMENTS AND THE FACTS THEREIN STATED ARE TRUE AND COMPLETE AND FILED WITH THE ILLINOIS ATTORNEY GENERAL FOR THE PURPOSE OF HAVING THE PEOPLE OF THE STATE OF ILLINOIS REPLY THEREUNDER.

PER CAMPAIGN MANAGER RICHARD TROIA
TITLE PRES.
SIGNATURE
OFFICER DIRECTOR OF CHARITY
SIGNATURE

Continued

REPORT OF INDIVIDUAL FUNDRAISING CAMPAIGN

VIETNOW NATIONAL
CAMPAIGN BEGINNING 6-30-89
ENDING 6-30-90

ADDRESS: 3008 Kilburn Ave.

CITY,STATE
ZIP CODE: Rockford, Illinois 61103
CHARITY INFORMATION
CO # 01 _____
NAME OF CHARITY'S CONTACT PERSON
Lamont Gaston
NAME
TELEMARKETING ASSOCIATES, INC.
PFR# 02-02880238
NATURE OF FUNDAISING ACTIVITY: PHONE SOLICITATION

A.

B.

	EXPENSES PER CHARITY
1. PROFESSIONAL FUNDRAISER FEE	
2. SOLICITOR COMPENSATION	49,778.91
3. SALARIES & RELATED	6,788.08
4. PRINTING	2,686.93
5. POSTAGE & OFFICE	989.92
6. TELEPHONE	3,535.43
7. RENT & UTILITIES	1,626.30
8. SUPPLIES	1,626.30

9. TRAVEL & AUTO INSURANCE	353.54
	424.25
10. DEPRECIATION & INTEREST ADVERTISING & PROMOTION	848.50
	707.09
11. PROFESSIONAL FEES	
REPAIRS & MAINTENANCE	919.21
	353.54
12 LICENSES, DUES & PERMITS	70.73
	TOTAL
EXPENSES (PER CHARITY):	
	$ 70,708.

C. TOTAL AMOUNT RAISED

D. $79,097.00

E. PERCENTAGE OF FUNDS RECEIVED BY CHARITY (A DIVIDED BY C)

F. $10%

G. WHERE WERE THE FUNDS DEPOSITED?

H. 1ST CHICAGO BANK OF OAK PARK

G. WHO (CHARITY OF PER) HAS SIGNATURE CONTROL OF THE ACCOUNT(S) LISTED ABOVE? PER

H. ATTACHE A SCHEDULE EXPLAINING IN DETAIL HOW EXPENSES LISTED ABOVE ARE ALLOCATED BETWEEN FUNDRAISING CAMPAIGNS?

RECEIVED BY THE PER.

WE, THE UNDERSIGNED, DECLARE AND CERTIFY THAT WE HAVE EXAMINED THIS REPORT INCLUDING ALL THE SCHEDULES AND STATEMENTS AND THE FACTS THEREIN STATED ARE TRUE AND COMPLETE AND FILED WITH THE ILLINOIS ATTORNEY GENERAL FOR THE PURPOSE OF HAVING THE PEOPLE OF THE STATE OF ILLINOIS REPLY THEREUNDER.

PER CAMPAIGN
MANAGER
SIGNATURE

OFFICER DIRECTOR
OF CHARITY
SIGNATURE

PROFESSIONAL SOLICITOR COMPENSATION REPORT

FOR THE FISCAL YEAR ENDING DECEMBER __, 1989

TELEMARKETING ASSOCIATES, INC
PFR # 02

___ OF ADDITIONS TO THE INFORMATION IN THIS STATEMENT MUST BE SUBMITTED IN THIS FORMAT

LIST ALL SOLICITORS EMPLOYED BY YOU DURING THE PERIOD COVERED BY YOUR ANNUAL FINANCIAL REPORT

SOLICITOR NAME & ADDRESS	SOCIAL SECURITY #	PHONE #	AMOUNT PAID	HOURS WORKED
SEE ATTACHED				
( ) ADDRESS				
( ) ADDRESS				
( ) ADDRESS				
( ) ADDRESS				
( ) ADDRESS				

( )

ADDRESS

( )

ADDRESS

( )

ADDRESS

( )

ADDRESS

PAGE ____ OF ____ PAGES

PROFESSIONAL SOLICITOR NAME & ADDRESS	SS#	AMOUNT PD
SUE BARILLA 211 DES PLAINES AVE FOREST PARK, IL 60130	321-36-5862	29,270.78
BOB BOLLHEIMER P.O. BOX 567 OAK PARK, IL 60303	347-16-6022	3,265.62
TYRONE BUSH 8721 ABERDEEN CHICAGO, IL	339-42-5248	12,796.82
JERRY CAMPBELL 1167 ALGONQUIN ROAD DES PLAINES, IL 60016	323-54-3311	120.00
CHRIS CARR 21W581 NORTH AVE LOMBARD, IL 60148	323-54-3311	14,028.90
COMMUNITY PUBLICATIONS 2924 N RIVER ROAD RIVER GROVE, IL 60171		83,472.25

LANCE CAMPO 4815 N ROCKWELL CHICAGO, IL 60625	526-84-0333	39,024.54
RUDY DEVITO 2924 N RIVER ROAD RIVER GROVE, IL 60171	037-30-9165	21,750.46
BILL FOWLES 838 N CORNELIA CHICAGO, IL 60657	317-60-8784	3,125.70
DON HALL		1,510.75
KRISTY HALL		1,052.00
CAROL JAROCKI		400.00
LORENZO JONES 2334 W. LAWRENCE CHICAGO, IL		19,807.15
BILL KURTZ (illegible) __APLE __ARK, IL 60302	424-60-9217	8,583.60
JOHN LOONSFOOT 306 BELOIT FOREST PARK, IL 60130	329-72-2843	1,547.50

WAYNE MACKIE 3912 N OSCEOLA CHICAGO, IL	348-46-0121	16,363.52
BEN MACTAVISH 4601 DEVON LISLE, IL 60532	036-32-5112	23,536.00
ERIC MIECK 6244 W GRAND, #2C CHICAGO, IL	330-62-4661	559.95
PETER MORALES 3003 S. THROOP CHICAGO, IL 60608	351-48-9483	14,888.35
FRANK OWENS 846 W MONTROSE CHICAGO, IL 60674	346-72-6173	25.00
PAB MARKETING 9014 BROOKFIELD AVE BROOKFIELD, IL 60513		169,928.41
NICK PATULA 5516 CAL-SAG ROAD ALSIP, IL 60658	355-50-6351	51,260.03
RICK PALAKOFF 7200 N CLARENDON CHICAGO, IL	340-50-8151	20,303.85

352-74-4341

NICK PROCE
3245 N BROADWAY
CHICAGO, IL 60657 — 290.00

OSWALD REDDICK
14651 CHICAGO
DOLTON, IL 60419 — 14,982.46

ANGEL REDDICK
14651 CHICAGO AVE
DOLTON, IL 60419 — 1,010.80

MARK ROGERS
1026 N CHURCH
ROCKFORD, IL 61103 — 10,966.20

359-14-5041

JOHN ROSS — 1,226.55

CHRISTIANA
CHICAGO, IL 60625

SILVIA
ANDRES STREET,
#2
PROVIDENCE, RI
02903 — 2,178.00

BOB STEFANSKI — 12,206.47

KEITH STRICKER — 20.00

BOB SZABELSKI — 37.00

T. V. MARKETING — 26,867.18

PRESTON TIEMAN — 13.40

PASCO TROIA
3924 N RIVER ROAD
RIVER GROVE, IL
60171

037-38-4094 — 2,456.00

PAUL THOMPSON 4525 N KEELER CHICAGO, IL 60651	332-44-9665	420.00
VALENSTEN CORP 5231 HARLEM AVE CHICAGO, IL 60656		12,454.75
LES WALKER 702 N 14TH AVE MELROSE PARK, IL 60160	326-70-5451	2,668.65
SHERRY MUSKA P.O. BOX 214 WORTH, IL 60182	318-58-3405	13,496.35
RUSSELL ROWLAND		189.50
STEVEN EVANS 1560 N 1ST AVE-DARTON EAST MELROSE PARK, IL 60160	347-50-2872	8,169.15
DAVID BYRD		106.10

JOHN HESLEY		100.00
PROPHECY PRODUCTIONS 2924 N RIVER ROAD RIVER GROVE, IL 60171		2,650.95
CHRIS GASIEWSKI 5815 W ARTHINGTON CHICAGO, IL		122.30
JIM VALENTINO 5231 HARLEM AVE CHICAGO, IL 60656		25.00
DEBORAH GABRIELE 12 ANDREWS ST, #2 PROVIDENCE, RI 02903		768.75
TROOPER PUBLICATION 107 S DOUGLAS, #1A SPRINGFIELD, IL	33-4400102	3,318.00
DAVE FEDERICI 5530 S ALBANY CHICAGO, IL	355-50-6103	497.00

MARK WASSNER		228.00
ANGELA BOYD		133.35
WILLIAM DAVIS		96.90
JEFF ZOLANOWSKI 1025 OAKLAND WESTMONT, IL 60559	347-74-3282	3,439.80
PHIL BIANCO 5549 S NAGLE CHICAGO, IL 60638		150.00
KATHY ANDERSON		71.40
RON MCMENAMY		11,174.72

924 N RIVER ROAD RIVER GROVE, IL 60171		
ROGER STETTNER		61.00
JENNY DONOHUE 3912 N OSCEOLA CHICAGO, IL		170.00
STEVE KENSEY 5212 S DORCHESTER CHICAGO, IL	350-66-4311	48.00
MARK INGRAFFIA 2924 N RIVER ROAD RIVER GROVE, IL 60171		300.00
A & G ADVERTISING		1,133.40
LEN CORK 1830 S 1TH BROADVIEW, IL 60153	344-36-2324	1,907.30
MITCH KAMINSKI		68.55

RON SNYDER 398 OAK STREET DES PLAINES, IL	330-52- 7688	30.00
ED HIGGINS 3226 S PARNELL CHICAGO, IL 60616		8,971.36
NANCY HERBERT 5701 N SHERIDAN CHICAGO, IL	346-44- 8098	153.25
WAYNE GNIRK 5342 N NEWPORT CHICAGO, IL 60641	395-28- 6234	2,576.00
TRINITY PROMOTIONS 2924 N RIVER ROAD RIVER GROVE, IL 60171		24,970.35
MAJOR MARKETING 4811 W DEVON CHICAGO, IL		2,287.65
STAN FOWLES		640.25

LAWRENCE CHICAGO, IL		
BOB GITONE		25.00
FRANCINE GEINARK 5342 W NEWPORT CHICAGO, IL 60641	333- 26- 8672	3,552.95
UNLIMITED SERVICES 1167 ALGONQUIN ROAD DES PLAINES, IL		22,560.30
ROBET FREDERICKS		14.00
ETTA TROIA 23 FLORIDA AVE CRANSTON, RI 02920		360.00
GEORGE LOWI 2745 N WINDSOR CHICAGO, IL 60625	351- 36- 107[illegible]	8,062.96
JOHN MCMENAMY		498.10
ROY DESMOND		2,600.00
ROBERT JONES		500.00

ADVANCED TELEMARKETING		265.20
MARKES TELECOMMUNICATIONS 72 S LANGRANGE ROAD LAGRANGE, IL		170.00
WAYNE NUNEZ 2322 N 72ND COURT ELMWOOD PARK, IL 60635	338-50-1277	1,175.90
ALVIN WILLIS 4824 W AUGUSTA CHICAGO, IL 60651	340-60-2507	1,007.70
JDZ ENTERPRISE		41,046.53

_RIVER ROAD _____GROVE, IL		
MARU KUCHARSKI		556.00
TONY HENRICKS		2,008.75
HOWARD KONGSGAARD 1535 W MONTANA CHICAGO, IL 60614	348-46-2761	4,884.25
RESOURCE ONE 1020 CEDAR, #2L ST. CHARLES, IL		24,031.58
DARRYL MITTLESTAEDT 6006 E 29YH CICERO, IL 60650	360-62-1588	82.00
PAT D'ADAMO 4693-2A SAIL BOAT BAY LISLE, IL 60532	322-34-3726	4,536.00
MARY MCMENAMY		4,637.35

PETE BORZYM 9014 BROOKFIELD AVE BROOKFIELD, IL 60513		2,990.00
LOU CARO		1,105.00
HEART TO HEART ADV., LTD. 107 S DOUGLAS, #1A SPRINGFIELD, IL 62704		6,998.50
DANIEL A. KUEHNER 327 S GLENWOOD SPRINGFIELD, IL 62703		833.50
NANETTE FALBO		442.70
JOHN GARCIA 4835 N KOSTNER CHICAGO, IL 60630	546- 47- 7547	337.35
MATT TAROMINA	522- 82- 9664	3,288.25

8014 PINEWOOD VIEW SANTEE, CA 92071		
OAN WROBLEWSKI 4126 W MELROSE CHICAGO, IL 60641	361-36- 8558	9,946.98
JIM SERPA 2924 N RIVER ROAD RIVER GROVE, IL 60171		8,539.65
DMS ENTERPRISES 11930 S WESTERN BLUE ISLAND, IL 60406		75,953.66
RON DOER 2054 N KILDARE CHICAGO, IL 60639	349-32- 3124	2,400.00
KURT KUDLINSKI		80.00
KEN LEO		629.17
VINCE PROCE		647.00

TONY HARRIS		22.00
RALPH DIAFERIA 6240 KEDZIE CHICAGO, IL	353-62-2651	7,996.70
MIKE WARREN 410 OCEAN AVE SANTA MONICA, CA	154-26-8046	225.00
ELLIOTT WOLFSON		25.00
VINCE DE FILIPPI		112.50
CHERYL VINTON		5,974.50
MICHELLE CHARTIER		60.00

HENRY WATSON		1,820.00
DEBBIE TAYLOR 2616 N REUTER FRANKLIN PARK, IL 60131	330-72-6876	642.20
MIKE WEBB 3636 NOTTINGHAM CHICAGO, IL 60634	361-60-6686	60.00
TONY HARRIS 6869 W GRAND CHICAGO, IL	336-25-4762	129.00
DEAN MORELLI 1701 16TH AVE CHICAGO, IL	327-89-2634	197.25
DEAN CALLIS 4601 KENNILWOTH FORESTVIEW, IL	346-53-3919	632.75
WALTER LAYNE		20.00
DAN KEANER		1,522.38
JOE SPAGNOLA		276.00

MICHAEL BAGGOTT		109.50
DEBBIE TAYLOR		217.50
PHIL OLIVERI		478.55
HELEN HANI		874.25
MICHELLE COMINEK	359-58-1409	800.00

STUART DRIVE CAROL STEAM, IL 60188		
HANK RICO 616 W LELAND CHICAGO, IL 60660	270-44-8062	4,559.75
RAY LANE 2834 N RIVER ROAD RIVER GROVE, IL 60171	335-44-7358	43.00
RAY STORICK		4,371.40
GREG GAFFIGAN-		16,405.83
VI LONA & ASSOCIATES		617.00
LOURIE BURKE		480.00
DENNIS WEBB		2.50
SCOTT SHEPARD		35.00

LYNDA WYZENINSKI 1529 W FRY ST CHICAGO, IL 60622	372-60-3627	457.50
SHARON DUDA		925.50
JAMES PHILLIPS		18.75
L & R PROMOTIONS		2,946.05
KPA, INC. 110 WALL STREET NORWALK, CT 06850		30,162.38
KIRK MOORE	357-25-7963	2,315.50

AUDUBON TORO, CA 92630		
ENTERTAINMENT UNLIMITED		5,469.50
GRANT MATLOCK		3,489.70
STEVE COMPANELLA		408.50
THERESA NUCCIO		2,336.15
JEROME KOSTIK		42.00
ENTERPRISES UNLIMITED		586.25
PETER NAYLOR 5204 W CULLOM CHICAGO, IL 60641	339-46-2534	25.00
JOANNA MINNECI 217 DES PLAINES AVE., GDN APT FOREST PARK, IL 60130	337-62-3757	60.00

KENNETH HAYES		705.50
CANDISS DONATO		125.50
PROTECTIVE PROMOTIONS		1,033.50
CAROL MIKLUSAK 505 N LAKE SHORE DRIVE CHICAGO, IL 60611	361-40-3785	133.00
RICHARD KINDELL 516 DEECHER STREET LOUISVILLE, KY 40217	263-32-9904	293.48
JOE ALEMAN		48.00

TROOPER PUBLICATION	40,394.90
WATSON	8,410.64

	1,098,337.01
	====== ===

EXPLANATION OF PROFESSIONAL FUNDRAISING FEES

FOR THE FISCAL YEAR ENDING DECEMBER ____, 1989

NAME TELEMARKETING ASSOCIATES, INC. PFR # 02 0288 0238

1. GIVE A DETAILED DESCRIPTION OF THE SERVICES RENDERED FOR CAMPAIGN DRIVE OR EVENT HELD OR ORGANIZED BY YOUR ORGANIZATION FOR THE PURPOSE OF RAISING FUNDS FOR A CHARITABLE ORGANIZATION

Phone solicitation is used for the purpose of selling advertising space in a annual publication for each organization. The purpose of the fund raising campaign is to generate dollars for each organizations various community service activities. The publication

is produced for the purpose of creating a human interest book, and advertising guide.

2. GIVE A DETAILED DESCRIPTION OF THE BASIS USED TO DETERMINE YOUR OWN ORGANIZATION'S COMPENSATION FOR SERVICES RENDERED ON EACH FUNDRAISING CAMPAIGN HELD OR ORGANIZED BY YOUR ORGANIZATION (i.e. PERCENTAGE OF FUNDS RAISED, TIME SPENT, RESOURCES USED ETC) SEE CONTRACT IS NOT ACCEPTABLE)

The basis of the fundraiser's compensation is calculated on a approximate scale as follows:

20%	employee compensation
5%	administrative expenses
35%	supplies and printing expenses
20%	phone, rent and office expenses

These figures are estimated on a average 80% contract

Office Locations:

2924 N. River Rd.
River Grove, IL 60171

1821 W. Irving Park Rd.
Chicago, IL 60613

6211 W. Diversey
Chicago, IL 60639

7011 W. 111th
Worth, IL

[ADDITIONAL EXHIBITS OMITTED]

[Filed June 15, 1996]
IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

THE PEOPLE OF the STATE OF ILLINOIS *ex rel.* ROLAND W. BURRIS, Attorney General of Illinois,	)	
Plaintiff,	)	
vs.	)	91 CH 04926
TELEMARKETING ASSOCIATES, INC., an Illinois Corporation; ARMET, INC., an Illinois Corporation; and RICHARD TROIA, individually and as an Officer, Director and fiduciary of TELEMARKETING ASSOCIATES, INC., and ARMET, INC.,	)	
Defendants.	)	

AMENDMENTS TO COMPLAINT

The Plaintiff hereby amends its Complaint for Injunctive Relief, An Accounting, Appointment of Receiver, and Other Equitable Relief by adding the paragraphs indicated as follows:

47A. For the calendar years since 1989, the defendants and their agents solicited, collected and remitted to Vietnow the following amounts:

Year	Total Amount Raised	Total Amount Remitted To Vietnow	Percent Remitted To Vietnow
1990	$1,315,606.18	$197,340.93	15 (in-state)
	223,595.63	22,359.56	10 (out-of-state)
1991	1,158,122.31	173,718.35	15 (in-state)
	298,423.48	29,842.35	10 (out-of-state)
1992	779,122.26	116,868.34	15 (in-state)
	101,222.61	10,122.26	10 (out-of-state)
1993	634,751.42	95,212.71	15 (in-state)
1994	662,504.27	114,058.52	17.21 (in-state)
1995	430,503.95	70,442.85	15.73 (in-state)

The defendants have continued their solicitation activities for Vietnow into 1996.

47B. While the in-state solicitations prior to about May of 1992 were made pursuant to the contracts attached to the original Complaint as Exhibit B, the in-state solicitations thereafter were made pursuant to the contract attached hereto as Exhibit G. Out-of-state solicitations were made pursuant to the contracts attached to the original Complaint as Exhibit C, as well as other contracts.

47C. For the years 1990 to date, TROIA and

TELEMARKETING have entered into, or caused to be entered into, numerous contracts with individuals and corporations (hereinafter "solicitors") to perform the actual in-state solicitations on behalf of Vietnow. The solicitors served as agents of TROIA and TELEMARKETING in the performance of the defendants' contractual obligations to Vietnow, and did not themselves have contracts with Vietnow.

67D. Under section 15(a) of the Solicitation for Charity Act, 225 ILCS 460/15(a), TROIA and TELEMARKETING were trustees who had a duty to, among other things, supervise the fund raising activity on behalf of Vietnow to ensure that the contributions were adequately protected and that representations made during solicitations of the public were true and correct.

67E. For at least the period 1990 to date, and perhaps prior to 1990, TROIA and TELEMARKETING failed to exercise the duty to supervise with respect to their agent solicitors. In particular, they failed to develop sales pitch scripts to be used by the solicitors when soliciting on behalf of ADC and they otherwise failed to undertake the steps necessary to ensure that the representations made by the solicitors were true. TROIA and TELEMARKETING have thus violated section 15(a).

67F. In soliciting for Vietnow, TROIA and TELEMARKETING and their agent solicitors rarely, if ever, disclosed to donors that less than 17 percent of the contributions would be paid over to Vietnow and that more than 83 percent of the contributions would be used for fund raising and other expenses.

67G. For the period 1990 to present, TROIA and TELEMARKETING have remained as fiduciaries of the donating public and have had a fiduciary duty to disclose, or to cause their agent solicitors to disclose, all material

facts. The fact that less than 17 percent of the contributions would be paid over to Vietnow and that more than 83 percent would be used for fund raising and other expenses is a material fact.

67H. TROIA and TELEMARKETING and their agent solicitors failed to disclose the fact that less than 17 percent of the contributions would be paid over to Vietnow and that more than 83 percent would be used for fund raising and other expenses, in order to induce contributors and potential contributors to rely on the absence of such information and thereby enhance the likelihood that such persons would make a contribution. TROIA and TELEMARKETING are responsible for the failures of their agent solicitors to disclose such information, for such failures to disclose are within the scope of the agency of such solicitors.

67I. Section 15(b)(5) of the Solicitation for Charity Act, 225 ILCS 460/15(b)(5), provides, among other things, that if a professional fund raiser engages in public solicitation and purports to relate the purpose for which the funds are solicited, "such [purpose] shall then be fully and accurately identified to the prospective donor." TROIA and TELEMARKETING, and their agent solicitors, did in fact purport to relate the purpose to prospective donors for which funds were being solicited in connection with their solicitations for Vietnow. They failed, however, to fully and accurately disclose the purpose to prospective donors, for they failed to disclose that less than 17 percent of the contributions would be turned over to Vietnow and that more than 83 percent would be used for fund raising and other expenses. TROIA and TELEMARKETING thus violated section 15(b)(5).

67J. In addition, TELEMARKETING is a for-profit enterprise. It and its agent solicitors have at all times relevant been engaged in the sale or distribution of a commercial service, namely, the solicitation of funds on a

compensated basis. TROIA and TELEMARKETING are thus engaged in trade or commerce for purposes of section 1 of the Consumer Fraud and Deceptive Business Practices Act (hereinafter "CFDBPA"), 815 ILCS 505/1.

67K. The failure of TELEMARKETING and TROIA to disclose that less than 17 percent of the contributions would be paid over to Vietnow and that more than 83 percent would be used for fund raising and other expenses, constitutes a violation of section 2 of the CFDBPA, which prohibits, among other things, unfair or deceptive acts or practices in the conduct of any trade or commerce, including but not limited to misrepresentation, concealment, suppression or omission of any material fact with intent that others rely upon such misrepresentation, concealment, suppression or omission.

67L. The failure of TROIA and TELEMARKETING and their agent solicitors to disclose that less than 17 percent of the contributions would be paid over to Vietnow and that more than 83 percent or more would be used for fund raising and other expenses also constitutes a violation of section 2 of the Uniform Deceptive Trade Practices Act (hereinafter "UDTPA") 815 ILCS 510/2, which is incorporated by reference into section 2 of the CFDBPA. Section 2 of the UDTPA prohibits deceptive trade practices which are defined to include, among other things, causing a likelihood of confusion or misunderstanding as to the sponsorship or approval for goods or services or as to affiliation or association by another; using deceptive representations; and engaging in any other conduct which creates a likelihood of confusion or misunderstanding.

67M. Not only did TROIA and TELEMARKETING intend that contributors and potential contributors would rely on the absence of information concerning the use of funds collected, but persons making contributions in fact relied upon their mistaken belief that much more than 17

percent of their contributions would be paid over to Vietnow, and they would not have made their contributions had they known the truth of the matter.

67N. Under these circumstances, the continuing failure of TROIA and TELEMARKETING to disclose, and their failure to cause their agent solicitors to disclose, that less than 16 percent of the contributions would be paid over to Vietnow and that more than 83 percent would go for fund raising and other expenses, constitutes fraudulent concealment.

67O. Such failure further constitutes a breach of fiduciary duty by TROIA and TELEMARKETING to donors and potential donors, which breach is continuing.

Wherefore, the Plaintiff prays that this Court, in addition to allowing the relief sought in the original Complaint,

(a) enjoin TROIA and TELEMARKETING from their continuing violations of law as described herein;

(b) enjoin TROIA and TELEMARKETING from continuing to act on behalf of charity for a period of 5 years; and

(c) enter an order requiring TROIA and TELEMARKETING to forfeit any compensation they have earned while in violation of section 15 of the Solicitation for Charity Act.

Dated: June 17, 1996

Respectfully submitted by:

/s/ Don R. Sampen
DON R. SAMPEN
Assistant Attorney General

DON R. SAMPEN #99000
Assistant Attorney General
Charitable Trusts Bureau
100 W. Randolph St., 12th Fl.
Chicago, IL 60601
Telephone: (312) 814-3969

TELEMARKETING ASSOCIATES, INC.
"the professionals of advertising and fundraising"

AGREEMENT

This Agreement is hereby made this 12th day of May, 1992, by and between Telemarketing Associates, Inc. (hereafter referred to as THE PUBLISHER), and VietNow National Headquarters, (hereafter referred to as THE SPONSOR). This Agreement shall begin on the 12th day of May, 1992 and end of the 30th day of July, 1998.

In consideration of the mutual covenants contained herein it is now therefore agreed that THE SPONSOR employs the services of THE PUBLISHER to conduct advertising by marketing advertising space and to publish THE SPONSOR'S publication (hereinafter, the "Marketing Program") and to conduct such other related activities pertaining to increasing public awareness and financial support for the organization, with the following agreements, requirements limitations and statements of responsibility.

THE PUBLISHER agrees:

a) To supply all marketing personnel, and pay all relative expenses such as salaries and commissions.

b) To annually produce, publish, edit and pay all costs for an advertising magazine (the "Ad Book"), including publication of a table of contents, index of advertisers and sequentially numbered pages, the intent being to supply a publication to increase the community awareness of THE SPONSOR and a forum of advertising to the business communities. At least 2,200 copies of the Ad Book are to be provided to THE SPONSOR in 1992, and the exact number

of copies of the Ad Book is to be provided to THE SPONSOR in 1993, 1994, 1995, 1996, 1997 and 1998 is to be mutually agreed upon in the forum of written permission by both parties, but it shall never be less than the prior year.

c) To market magazine listings (booster program) for night sales to residences.

d) To pay all costs for an office and phones, including the cost of installation, incurred by THE PUBLISHER in conjunction with the Ad Book.

e) To conduct an efficient and professional marketing program, promote goodwill on behalf of THE SPONSOR and enhance good public relations through THE PUBLISHER'S sales techniques.

f) The Marketing Program will be conducted throughout the state of Illinois, as well as nationally with offices in other states.

g) In the delivery of the program service message for and on behalf of THE SPONSOR, THE PUBLISHER agrees to solicit individual donations and advertising for the Ad Book. For accounting purposes, THE PUBLISHER agrees to maintain separate records to clearly and properly allocate income attributable to the solicitation of donations only, and income which is attributable to advertising sales, in accordance with the applicable state and federal regulations.

h) THE PUBLISHER agrees to be solely responsible for any and all expenses incurred in the creation of the program activity hereinabove described, and to hold THE SPONSOR harmless therefrom.

i) THE PUBLISHER agrees that throughout the term of this AGREEMENT, THE PUBLISHER nor any of it's affiliates will not enter into an agreement and/or contract with or without the express written consent of THE PUBLISHER. Pursuant to the December, 1991 ADDENDUM, VietNow National has given THE PUBLISHER approval to fund raise or sell advertising on behalf of United Veteran's and Family Support "Homeless Veterans" Project (Fort Steer) and shall remain in force throughout the term of this AGREEMENT.

j) THE PUBLISHER agrees to permit THE SPONSOR'S officers to visit and view its offices and facilities during business hours, upon reasonable notice by THE SPONSOR (which notice may be given by telephone.

k) THE PUBLISHER agrees to promptly provide THE SPONSOR with a copy of any financial reports THE PUBLISHER files with any governmental department or agency relating to THE PUBLISHER'S general activities or to its activities under this Agreement.

l) THE PUBLISHER agrees to supply THE SPONSOR with copies of all signed contracts from those engaged in business using the name of VietNow.

m) THE PUBLISHER agrees to pay all state registration costs and fees until the donor file outside the State of Illinois becomes more profitable to THE SPONSOR.

n) THE PUBLISHER agrees that this AGREEMENT covers the following forms of fund raising activities:

1. Telephone solicitation
2. Bulk mail
3. thrift stores

4. Donation cans
5. Curbside collections

The percentage of funds and allocations for these activities are the same as those stated in page 3, "BOTH PARTIES AGREE", sub-section b.

THE SPONSOR agrees:

a) To cooperate and assist THE PUBLISHER in all reasonable and necessary forms. To provide THE PUBLISHER with a letter signed by an officer of THE SPONSOR thanking interested advertisers or donors and providing a program service message.

b) THE SPONSOR agrees that throughout the term of this AGREEMENT THE SPONSOR will not allow any other professional fund raiser to use the trademark name of VietNow and logo in any similar fund raising activities as currently stated in this AGREEMENT without the express written consent of THE PUBLISHER.

c) That THE PUBLISHER has full authority to use SPONSOR approved materials containing the logo and good name of THE SPONSOR during the sales campaign, with the exception that THE PUBLISHER must secure permission from THE SPONSOR to use the VietNow logo or letterhead on any new materials. Such permission or approval must be in writing. THE PUBLISHER agrees to have all letterhead and/or printed material pre-approved by THE SPONSOR and must contain accurate/current information, such as addresses, phone numbers, and letterhead reflecting the list of names of Board members.

d) THE SPONSOR acknowledges and agrees that a portion of the consideration it is receiving for entering into

this Agreement with THE PUBLISHER is the existing donor list which is being provided at no costs to THE SPONSOR. Said list has been developed by THE PUBLISHER, over a period of years, and THE SPONSOR hereby agrees that any additions or deletions which may result form this Marketing Program, as well as the list itself, shall remain sole and exclusive property of THE PUBLISHER.

BOTH PARTIES AGREE:

a) THE PUBLISHER shall ask potential donors and advertisers for all payments to be made by check or money order, payable to THE SPONSOR, and shall endeavor to accept payment in that form. However, if the payor insists upon paying in cash, such payment shall be accepted by THE PUBLISHER or THE SPONSOR (whichever receives it) by the recipient concurrently obtaining fro the payor a copy of the receipt for such payment, countersigned by the payor. THE PUBLISHER shall promptly deliver all checks, money orders and cash payments it receives in the name of or for THE SPONSOR to such person, or have them deposited in such bank account, as may be jointly designated by THE SPONSOR'S president and treasurer form time to time.

b) THE PUBLISHER shall, as its total compensation for all efforts and costs associated with the Marketing Program, be allocated 85% of the gross collections in the State of Illinois, and 90% of the gross collections outside of the State of Illinois, and THE SPONSOR shall be allocated 15% of the gross collections in the State of Illinois and 10% of the gross collections outside of the State of Illinois. Percentage of funds received outside of State of Illinois will be increased when the donor file outside of the State of Illinois becomes more profitable to allow such an increase. Increases in the percentage rate will be in increments of 1%

(one percent), escalating to 5% (five per cent). Percentages outside the State of Illinois will be adjusted upwardly by mutual consent on January 1, 1993 or sooner.

c) Gross collections received by THE SPONSOR are to be divided on a weekly basis, and THE PUBLISHER paid its share of the collections by THE SPONSOR on that same basis. For this purpose, THE SPONSOR will be deemed to have received collections when such funds become available in its bank account, provided that THE SPONSOR has promptly deposited all checks and money orders it has received. THE PUBLISHER and THE SPONSOR agree that THE SPONSOR needs more frequent and more detailed reports of the progress of the Marketing Program. THE PUBLISHER agrees to provide THE SPONSOR with information concerning the amount and geographic source of pledges, orders, collections, expenses and the balance due THE PUBLISHER. Such information shall be provided on a quarterly basis.

d) No later than 60 days prior to the publication date for the Ad Book, THE PUBLISHER shall submit a final proof of the Ad Book to THE PUBLISHER for approval. THE SPONSOR shall have 30 days from the date of receipt to either approve or object to the proposed copy, and to submit changes or comments. If no objection or comments are received within 30 days, THE PUBLISHER shall be entitled to consider the proof approved for final printing.

e) That with regard to the Ad Book, THE PUBLISHER shall leave for THE SPONSOR twelve (12) pages whereby THE SPONSOR might supply copy of its choosing, provided that it be submitted at least sixty (60) days prior to publication.

f) THE PUBLISHER assumes no responsibility for and shall not be liable for any inability to conduct the Marketing Program due to labor strikes, labor trouble, flood, fire, accident, acts of God or any other causes beyond its reasonable control.

g) Before extending the Marketing Program to any state, THE PUBLISHER shall notify THE SPONSOR of its intention to take such action, and shall provide THE SPONSOR with an option of legal counsel for an opinion that it has complied with all legal requirements for making charitable solicitations and conducting an advertising campaign such as the Marketing Program and local agencies in such state. Provided that THE PUBLISHER has provided THE SPONSOR with reasonable notice of its intent to extend the Marketing Program to another state, such jurisdiction to permit THE PUBLISHER to conduct such activities, and shall provide THE PUBLISHER with an option of legal counsel for an opinion and a copy of all documentation filed with state and local agencies to such effect within the deadline set by THE PUBLISHER. The parties agree that with respect to the States of Illinois and Wisconsin, they have each informed the other of their respective status, and THE PUBLISHER and THE SPONSOR each represent to the other that it is not legally barred from conducting the Marketing Program in either state.

h) THE PUBLISHER acknowledges that THE SPONSOR has a great interest in maintaining good relations with each of its chapters, and that such chapters want advance notice of THE PUBLISHER'S solicitations in their areas. To that end, THE SPONSOR will provide THE PUBLISHER with maps showing the location of every VietNow Chapter. At least one month before beginning the

Marketing Program in the area of any chapter, THE PUBLISHER will inform THE SPONSOR in writing.

i) This Agreement is governed by the laws of the State of Illinois and should either party hereto institute a legal action of any kind concerning the Agreement, it is mutually agreed said action will be instituted in Cook County, Illinois.

j) In the event the Marketing Program is not renewed through mutual agreement by and between the parties hereto for an additional term, then in that even, THE SPONSOR agrees that after termination of this Agreement and for a period of one (1) year, THE PUBLISHER shall have a first right of refusal to match any other offer THE SPONSOR may seek or obtain to conduct a like or similar program. In the event THE SPONSOR shall receive and agree to such an offer from a third party, then it that event, THE SPONSOR shall give notice of same to THE PUBLISHER in writing, together with a copy of the bond ____ contract offer. This notice shall be sent by certified mail, return receipt requested to: Telemarketing Associates, Inc., 2924 North River Road, River Grove, IL 60171; and Errol Copilevitz, Kansas City, MO 64105. Upon receipt of said written offer, THE PUBLISHER shall have ten (10) days to accept or reject same in writing.

k) THE PUBLISHER agrees that the Marketing Program is to be conducted in an efficient, professional and courteous manner, with the protection of THE SPONSOR'S reputation and goodwill being of primary concern. To this end, THE PUBLISHER agrees that only individuals having suitable familiarity with THE SPONSOR'S policies, goals and interests are to be utilized in the Marketing Program. Furthermore, promptly upon receiving written request from THE SPONSOR, THE

PUBLISHER shall submit for THE SPONSOR'S approval a transcript of any "script" and all other advertising and solicitation materials used by its independent contractors in connection with the Marketing Program. If THE SPONSOR objects to THE PUBLISHER'S use of any "script" or other solicitation or advertising materials or methods, THE PUBLISHER shall immediately cease using the material or method objected to, and both parties shall use their best efforts to devise a mutually satisfactory substitute. THE PUBLISHER agrees contractors must be restricted to the designated and approved "pitch" when soliciting for funds.

l) The parties hereto mutually acknowledge and agree that the Marketing Program under this Agreement includes the sale of advertising, the solicitation of donations and the distribution of educational and program service message. It is further acknowledged and agreed that the expenses of the public relations campaign and delivery of the program service message, shall be paid out of the proceeds raised by the sale of advertising from the Ad Book. Other costs which shall be allocated to the Marketing Program will include the availability and use of facilities and training, computer created data, printing, accounting, handling, mailing and other expense related thereto.

m) In addition, thereto, the program service of THE SPONSOR may be set forth in the editorial content provided for publication in the Ad Book at THE SPONSOR'S discretion. In accordance with State of Position 87-2, issued by the American Institute of Certified Public Accountants on August 21, 1987, the parties jointly agree that the portion of expenses attributable to program service and their delivery of program service message, shall be allocated to the program service message.

n) Should either party hereto claim that the other is in default under the terms and conditions hereof, then the party claiming default shall be obligated to give notice in writing, specifying the nature of the default. The party then in default shall either correct the default, or commence correction within thirty (30) days of notice. If the party allegedly in default does not cure same, the party giving notice of default may seek such damages and other remedies as may be available at common or in equity. In the event there shall be a dispute of whether a default does in fact exist, this matter will be submitted to a representative of the American Arbitration Association in Chicago, Illinois, with the finding thereof to be binding upon both parties. Notice by the parties shall be sent to the addresses set forth herein or until such addresses are changed by written notice: THE PUBLISHER, Telemarketing Associates, Inc., 2924 North River Road, River Grove, Illinois, 60171; THE SPONSOR, VietNow, National Headquarters, 1835 Broadway, Rockford, Illinois, 61104.

o) In addition thereto, Telemarketing Associates, Inc. shall pay to VietNow the additional sum of twenty thousand dollars ($20,000.00) upon execution of this Agreement, receipt of which is acknowledged by the signatures on this Agreement. Four thousand dollars ($4,000.00) has already been received by VietNow, the remaining sixteen thousand dollar ($16,000.00) balance to be paid upon the request of VietNow. Distribution, date and time of allocation to be decided by VietNow.

p) This AGREEMENT shall supersede and nullify any and all previously entered into agreements/contracts.

q) THE PUBLISHER agrees not to engage in any other form of fund raising activity on behalf of THE SPONSOR other than that stated in this AGREEMENT without express written consent of THE SPONSOR. Such written consent shall be an ADDENDUM to this AGREEMENT. Such ADDENDUM shall be mutually agreed to and negotiated by both parties.

r) That for the purpose of this Agreement, both copies of said Agreement, when signed and accepted by both parties shall be construed as a legal and binding contract.

/s/
Lamont C. Gaston, President, VietNow National

/s/
Richard Von Hatten, Vice Pres., VietNow National

/s/
Richard Troia, President, Telemarketing Associates, Inc.

[Filed December 4, 1996]

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

THE PEOPLE OF the STATE OF ILLINOIS *ex rel.* ROLAND W. BURRIS, Attorney General of Illinois,	)	
Plaintiff,	)	
vs.	)	91 CH 04926
TELEMARKETING ASSOCIATES, INC., an Illinois Corporation; ARMET, INC., an Illinois Corporation; and RICHARD TROIA, individually and as an Officer, Director and fiduciary of TELEMARKETING ASSOCIATES, INC. and ARMET, INC.,	)	
Defendants.	)	

AMENDMENTS TO COMPLAINT

Plaintiff THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois, pursuant to leave granted by the Court in its Order of November 4, 1996, hereby amends its Complaint For Injunctive Relief, An Accounting, Appointment of Receiver, And Other Equitable Relief (as amended by the Amendments to Complaint filed June 25, 1996) by correcting and renumbering on the face of the June 25, 1996 amendment to the complaint paragraphs numbered 47A - 47C and 67D - 67O as paragraphs 48 through 62 and by adopting and

realleging such in its entirety, and by adding the following additional allegations (paragraphs) and additional requests for relief as set forth below:

63. From 1987 through the present, in conducting their charitable solicitations for Vietnow as aforesaid, the Defendants made representations which induced donors to contribute funds for charitable purposes to Vietnow by representing to donors that the funds they contributed would go to charitable purposes.

64. The public donors, in reliance upon the representations of the Defendants and their agents as to the use of contributions, made contributions to and in the name of Vietnow and delivered said contributions into the control of the Defendants.

65. The Defendants put into place agreements, controls of the funds and a scheme which placed the Defendants in control of the donor lists, bank accounts and initial use and distribution of the contributions once they were received from the donating public.

66. The Defendants by and through their agents had the contributions placed into accounts and the funds divided with the Defendants keeping for themselves at least 83% of the funds collected in Vietnow's name, claiming such to be fees and paying only the remainder to Vietnow.

67. The Defendants and their agents hold themselves out to be in the business of soliciting and collecting funds for charity and by virtue of such they have superior knowledge and skill in the area of charitable fundraising and they know that the cost of soliciting established donors is much less than cold call soliciting or prospective new donors.

68. Many contributors to Vietnow were solicited year after year by Defendants and they made contributions year after year to help the veterans. In each case the portion

kept by Defendants remained at 83%. Defendants still charged and kept 83% for each and every dollar raised whether the donation came from an established donor or a new donor.

69. The aforesaid scheme and conduct of Defendants does not permit the charity to gain from a growing donor list, but rather permits the Defendants and their agents to benefit from soliciting the established donors over and over again at a reduced cost to Defendants and their agents without passing such on to the charitable cause.

70. The aforesaid scheme and conduct of Defendants results in the donors from previous periods being subjected in each and every contribution to the cost of 83% of their contribution no matter what amount. Such a charge is excessive for fundraising from a prior donor.

71. The Defendants, being in a superior position as aforesaid and as fiduciaries, have a duty to charge fair fees and to not act in a manner of self gain and the charging of 83% for soliciting and collecting a second, third, fourth and so on contribution from a particular donor is a breach of duty and fraud.

72. The Defendants' charge of 83% is excessive. The Defendants claim in part to justify such a fee by a claim of large expenses; however, many of those expenses are paid to other business owned and controlled by Defendant TROIA. Thus the 83% charged as a fee by Defendants is not justified by expenses paid by Defendants.

73. The representations delivered by the Defendants through their agents to contributors that donated funds would benefit Vietnow is and was substantially false, because only a small fraction of the amount of each donation, less than 17 cents on the dollar, went to the charitable organization Vietnow for charitable use.

74. The donors receiving the aforesaid solicitations by the Defendants relied on Defendants' representations that their contributions would be paid over to Vietnow and they would not have made their contributions had they known that the Defendants were keeping 83% of the contributions as a private fee. Donors' affidavits disclosing that they would not have given had they known the truth are attached hereto as Group Exhibit "H".

75. As a consequence of the foregoing, the Defendants' representations of charitable use for the solicited contributions as aforesaid constituted material misrepresentations of fact and, as a result, the monies they collected pursuant thereto were collected under false pretenses.

76. The solicitation Act provides at Section 9(c):

"(c) Whenever the Attorney General shall have reason to believe that any charitable organization, professional fund raiser, or professional solicitor is operating in violation of the provisions of this Act, or if any of the principal officers of any charitable organization has refused or failed, after notice, to produce any records of such organization or there is employed or is about to be employed in any solicitation or collection of contributions for a charitable organization any device, scheme, or artifice to defraud or for obtaining money or property by means of any false pretense, representation or promise, or any false statement has been made in any application, registration or statement required to be filed pursuant to this Act in addition to any other action authorized by law, he may bring in the circuit court an action in the name, and on behalf of the people of the State of Illinois against such charitable organization and any other person who has participated or is about to participate in such solicitation or collection by employing such device, scheme, artifice, false representation or promise, to enjoin such charitable organization or other person from continuing such solicitation or collection or engaging therein or doing any acts in furtherance thereof, or to cancel any registration statement previously filed with the Attorney General."

77. At all times relevant hereto the Defendants knew that their representations to donors that donated funds would go to help veterans were substantially and materially untrue, but Defendants made those representations for personal benefit from the 83% of all contributions kept as a fee.

78. The Defendants were fiduciaries for charity of all funds they collected and as fiduciaries they had a special duty at law not to mislead donors about the purpose of the donations and a duty to apply the donations to the represented use once in their hands.

79. The defendants' conduct as aforesaid in telling donors that their donations would benefit veterans when such was substantially and materially untrue constitutes a breach of their fiduciary duty to donors and the PEOPLE, which breach is continuing.

80. In addition, the Defendants' conduct in devoting only an insignificant portion (less than 17 percent) of solicited funds they solicit to the charitable purpose represented to the donors while causing the substantial majority of it to inure to themselves constitutes a waste and misuse of charitable assets, self-dealing and a breach of fiduciary duty to donors and the PEOPLE, which breach is continuing.

81. As a consequence of the foregoing, the conduct of the Defendants is repugnant to the very essence of charity and fiduciary duty. The conduct is a scheme of self-promotion at the expense of charity and such use of charitable assets must be held improper.

WHEREFORE, Plaintiff the PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois, prays that this Court, in addition to granting the relief sought in the original Complaint and in the subsequent Amendments thereto, also grant relief as follows:

I. Entering judgment against each of the Defendants respectively and in favor of the Plaintiff for compensatory damages in an amount in excess of $100,000.00 as to each and every Defendant as is determined upon the trial and accounting herein; and

J. Entering judgment against each of the Defendants respectively and in favor of the Plaintiff for punitive damages in an amount equal to the compensatory damages herein and at least $100,000.00 as to each and every Defendant.

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois

BY: /s/ Floyd D. Perkins
FLOYD D. PERKINS
MATTHEW D. SHAPIRO

FLOYD D. PERKINS #99000
MATTHEW D. SHAPIRO
Assistant Attorneys General
Charitable Trusts and
Solicitations Bureau
100 West Randolph Street, 12th Fl.
Chicago, Illinois 60601-3175
Telephone: (312) 814-2595

[GROUP EXHIBIT H]

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Mr. Robert Zeller
1201 Greenwood Drive
Mt. Prospect, Illinois 60056

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *1/27/96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave (a check) (cash) (circle one) In the amount of $ *$25.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *VIETMAN VETERANS IN NEED* (please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes **No** (8) I still have the materials sent to me. *RECEIPT ONLY*

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor. *I DON'T RECALL*

Circle (a), (b) (c) or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. (c) I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation. *I WAS GIVEN A RECEIPT, BUT I DON'T RECALL WHEN*

OTHER COMMENTS: _____

_____

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Robert Zeller* Date: *1/28/96*
Daytime Phone # *847 398 6759*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

G. Mark Witzel
21 South Lincoln Street
Westmont, Illinois 60559

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *2/2/95* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave (a check) (cash) In the (circle one) amount of *$25.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *VIETNAM VETS* (please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes **No** (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check)., *OR OBTAINABLE FROM BANK*

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) (c) or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. (c) I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation. *CAN'T REMEMBER/NOT SURE*

OTHER COMMENTS: _____

_____

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ G. Mark Witzel* Date: *7/26/96*
Daytime Phone # [omitted]

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Ms. Donna Winkler
304 South Lancaster Avenue
Mt. Prospect, Illinois 60056

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *NUMEROUS X's OVER 2 YEARS* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave (**a check**) (cash) In the amount of $ *80.00* . circle one *12-94 $25.00* *2-96 $20.00* *5-95 $35.00*

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for VIETNAM VETERANS & FAMILIES & OVERHEAD. . NO LABOR EXPENSES ALL MEMBERS ARE VOLUNTEERS (please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes No (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check).

Yes **No** (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (***b***) (c) or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. (c) I was given a receipt at the time I made the donation. *(AT THE TIME OF THE PHONE CALL)* (d) I was given a receipt after I made the donation.

OTHER COMMENTS: _____

_____

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Donna M Reid* Date: *7-28-96*
Daytime Phone # *(847) 818-7842*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Mr. Chip Webster
243 Bristol Way
Bolingbrook, Illinois 60440

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *FEB. 1996* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) In the (circle one) amount of $*25.00*

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *HELP VIETNAM VETERANS WHO NEEDED IT*
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes **No** (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) (c) or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. **(c)** I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: *SOLICITATION WAS MADE BY PHONE FIRST, AND THEN COLLECTED BY SOMEONE WHO CAME TO THE HOUSE.*

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Chip Webster* Date: *July 23, 1996*
Daytime Phone # *708-271-8815*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Ms. Linda Weakley
Four Seneca Drive
Montgomery, Illinois 60538

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *1/8/96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave (**a check**) (cash) In the amount of $ *10.00* . *#5164 on 2/4/96*
circle one

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *VETERANS OF VIETNAM WAR TO AID IN THEIR SUPPORT BOTH PHYSICAL & MENTAL AS WELL AS LEGAL MATTERS*
(please state specific purpose, if any)

ABSOLUTELY
Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now. *I asked how the money would be used. My exhusband & father.*

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes No (8) I still have the materials sent to me. *THE ONLY THING SENT WAS A COPY OF THE FORM YOU ALREADY HAVE.*

Yes **No** (9) I have the cancelled check (if payment was by check). *IT'S AT THE BANK. I HAVE TO REQUEST A COPY & PAY FOR IT.*

Yes No*(?)*(10) My donation was picked up by someone on behalf of the solicitor.
CAN'T REMEMBER IF IT WAS A PICK UP OR BY MAIL.

Circle (a), (b) (c) or (d) (11) (a) I was not given a receipt. ***(b)*** I was given a receipt before I made the donation. (c) I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation. *IT WAS MAILED! I CAN SEE THE POSTAL DATE STAMP & REQUEST FOR RETURN*

OTHER COMMENTS: *THE PERSON CALLED 1/8/96 WAS JACKIE LITTLE - IT'S WRITTEN BY HAND ON THE RECEIPT W/REQT TO RETURN WHITE & KEEP YELLOW COPY. SEE ATTACHED.*

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Linda Weakley* Date: *7/26/96*
Daytime Phone # *(708) 979-4646 Soon (630)*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Mr. Lafrayette Ward
1003 South Cuyler
Oak Park, Illinois 60304

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *2-1-96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) In the (circle one) amount of $ *35.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *VIETNAM VETERANS WHO WERE INJURED* (please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

(SOME)
Yes No (8) I still have the materials sent to me.

(COPY)
Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) (c) or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. (c) I was given a receipt at the time I made the donation. **(d)** I was given a receipt after I made the donation.

OTHER COMMENTS: _____

_____

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Lafrayette Ward* Date: *7-26-96*
Daytime Phone # *(708) 445-8731*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Mr. Peter Vozas
587 Scot Court
Inverness, Illinois

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *2-5-96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) In the (circle one) amount of $*20.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *HELPING VIETNAM VETS SUFFERING FROM "AGENT ORANGE"* (please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes **No** (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) **(c)** or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. (c) I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: _____

_____

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Mrs. Karen Vozas* Date: *7-31-96*
Daytime Phone # *(847) 705-9225*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Mr. Paul Viane
1623 West Kingston
Schaumburg, Illinois 60193

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *FEB. 3 - 96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave (**a check**) (cash) (circle one) In the amount of $ *20.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *VIETAM VETS*

_____
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes **No** (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) (c) or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. (c) I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: *I AM NOT SURE BUT I THINK MY ANSWERS TO QUESTION 11 IS B.*

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Diane Viane* Date: *August 5, 1996*
Daytime Phone # *630-773-3800 X 4760*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Ms. Barbara A. Vander Muelen
216 North Washington
Westmont, Illinois 60559

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *2-2-96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave (**a check**) (cash) In the amount of $ *25.00*. (circle one)

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *HELPING VIETNAM VETERANS & THEIR FAMILIES.* (please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes No (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) (c) or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. **(c)** I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: *VIETNOW BEGAN SOLICITING MONEY FOR FOOD BASKETS GIVEN TO VETS & THEIR FAMILIES FOR THANKSGIVING. THEY BEGAN (0VER)*

[material on reverse omitted]

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Barbara A. Vander Muelen* Date: *8-6-96*
Daytime Phone # *630-794-8000*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Ms. Margaret Valentine
234 Windsor Drive
Bolingbrook, Illinois 60440

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *2/8/96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) In the (circle one) amount of $*25.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *HELPING OTHER VETERANS SUCH AS THE HOMELESS.* (please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

(?)
Yes No (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) (c) or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. **(c)** I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: *PLEASE LET ME KNOW THE OUT COME OF THIS INVESTIGATION*

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Margaret Valentine* Date: *7-30-96*
Daytime Phone # *(847) 734-4323*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Ms. Catherine A. Trowbridge
215 East Traube Avenue
Westmont, Illinois 60559

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *2-2-96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave (a check) (cash) In the (circle one) amount of $*25.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *VETERANTS HELPING VETERANTS*
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes No (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) (c) or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. **(c)** I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: _____

_____

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Robert Trowbridge* Date: *7-27-96*
Daytime Phone # *325-7385*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Ms. Barbara Thompson
4924 Oakwood Avenue
Downers Grove, Illinois 60515

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *1/26/96* (insert approximate date). *AND EARLIER YEARS.*

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) In the (circle one) amount of $*25.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *BENEFITING VETERANS WHO WERE INJURED IN THE VIETNAM WAR*
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes **No** (8) I still have the materials sent to me.–*I MAY HAVE, BUT I HAVE TO GO THROUGH MY FILES.*

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) **(c)** or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. **(c)** I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: *I THINK YOU SHOULD INVESTIGATE THE POLICE AND FIRE DEPARTMENTS CALLING FOR THEIR ASSOCIATIONS IMPLYING IT IS CHARITABLE WHEN IT'S NOT. THEY GET PUSHY.*

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Barbara Thompson* Date: *8/3/96*
Daytime Phone # *(630) 964-7708*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Ms. Lois Staffeldt
122 South Linden Street
Westmont, Illinois 60559

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *2/1/96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) (circle one) In the amount of $ *25.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *FOOD BASKETS, BILLS AND RENT TO HELP PHYSICALLY AND MENTALLY DISABLED VIETNAM VETS AND THEIR FAMILIES* (please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes **No** (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) (c) or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. **(c) I was given a receipt at the time I made the donation**. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: *I WAS ASKED TO LEAVE THE CHECK IN BETWEEN THE DOORS AND A RECEIPT WAS LEFT IN ITS PLACE*

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Lois Staffeldt* Date: *7/31/96*
Daytime Phone # *968-7871 B/F 1:00 p.m*
968-8591 AFTER 2:00 p.m.

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Ms. Joyce M. Shanahan
6380 Glenbrook Court
Lisle, Illinois 60532

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about _____ (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave (**a check**) (cash) In the (circle one) amount of $ *25.00* (*25.00*). *June '96* *Feb. '96*

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *VIET VETS IN DU PAGE – FIND JOBS – GET ON THEIR FEET HOMELESS VETS*
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes No (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check). *2 CHECKS FOR '96*

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) **(c)** or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. (c) I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: _____

_____

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Joyce M. Shanahan* Date: *8-14-96*
Daytime Phone # *630-961-2370*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Mr. Michael Schaefer
722 South Chester
Park Ridge, Illinois 60068

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *2-3-96* (insert approximate date).

Yes **No** (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) In the (circle one) amount of $*25.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *ASSIST VIET VETS*

_____
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes No (8) I still have the materials sent to me.

Yes **No** (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) **(c)** or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. (c) I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: *THIS WAS DOOR TO DOOR. SOLICITATION. I HAVE MADE SIMILAR DONATIONS IN THE PAST*

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Michael Schaefer* Date: *9-23-96*
Daytime Phone # *312-263-2088*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Mrs. Robert Sanders
814 North Lombard
Oak Park, Illinois 60303

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about _____ (insert approximate date). *CAN'T REMEMBER, CHECK DATED 2/1/96*

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) In the (circle one) amount of $ *10.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *HELPING VIETNAM VETERANS*

(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes No (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check).

Yes **No** (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) (c) or (d) (11) (a) I was not given a receipt. **(b)** I was given a receipt before I made the donation. (c) I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: _____

_____

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Lois Sanders* Date: *Aug. 1, 1996*
Daytime Phone # *(708) 848-9543*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Mr. Robert Rutkoski
157 Mayfield Drive
Bolingbrook, Illinois 60440

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *2/1/96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) In the (circle one) amount of $*10.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *SUPPORT OF VIETNAM VETS*

_____
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes **No** (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) (c) or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. **(c)** I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: _____

_____

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ R* Date: *7/25/96*
Daytime Phone # *708 739 4502*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Ms. Carmen Rollery
829 North St. Johns Avenue
Highland Park, Illinois 60035

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *2-5-96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) (circle one) In the amount of $ *25.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *HELPING THE VETERANS*

_____
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes No (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) (c) or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. **(c)** I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: *PRIOR TO THE LAST CALL, THE SOLICITOR CALLED AT LEAST 4 DIFFERENT DATES AND TIME. VERY PERSISTANT!!*

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Carmen Rollery* Date: *July 26/'96*
Daytime Phone # *847-432-1835*

ENC:

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Charruk PongKlub
950 Jameseson
Westmont, Illinois 60559

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *1/96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) In the (circle one) amount of $ *15.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for _____
_____
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes **No** (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) (c) or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. **(c)** I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: *CLOSE ALL OF THEM DOWN NO MORE PHONE DONATION*

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: *Charruk PongKlub* Date: *7-26-93*
Daytime Phone # *(708) 876-4024*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Ms. Geraldine R. Picha
313 South Oak Avenue
Westmont, Illinois 60559

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *Feb. 96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave (a check) (**cash**) (circle one) In the amount of $*25.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *HELPING VIET VETS GET A BETTER CHANCE AT LIFE (JOB, TRAINING, ETC).*
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes No (8) I still have the materials sent to me. *(WINDOW STICKER)*

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) (c) or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. **(c)** I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: _____

_____

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Geraldine R. Picha* Date: *7/29/96*
Daytime Phone # *708-245-2888*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Mr. Michael Ortrenga
Four Shilling Court
Bolingbrook, Illinois 60440

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *1/31/96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) In the (circle one) amount of $ *20.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *HELPING OUT VETS*

_____
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes **No** (8) I still have the materials sent to me.

Yes **No** (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) **(c)** or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. **(c)** I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: _____

_____

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Michael Ortrenga* Date: *8/7/96*
Daytime Phone # *968-0144*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Mr. Jonathon R. Nolan
530 Revere Avenue
Westmont, Illinois 60559

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *2-2-96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) In the amount of $ *25.00*. (circle one)

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *"PROGRAMS" FOR THE VETS*

_____
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes **No** (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was **picked up by someone** *(on behalf of the solicitor.?)*

Circle (a), (b) **(c)** or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. **(c)** I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: _____

_____

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ J.R. Nolan* Date: *7-26-96*
Daytime Phone # *(708) 654-4130*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Caron Niewold
1634 Janet Street
Downers Grove, Illinois 60515

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *1-30-96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) In the (circle one) amount of $*15.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *COUNCIL AND RELEIVE OF VETS AND FAMILIES OF VETS*
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes **No** (8) I still have the materials sent to me.

Yes **No** (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) (c) or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. **(c)** I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: *I WOULD NEVER CONTRIBUTE IF I KNEW THE MONIES WHERE NOT USED FOR THE PURPOSE INTENDED TO ME.*

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ C. Niewold* Date: *Aug. 3, 1996*
Daytime Phone # *630-968-2608*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Mrs. C. Napolitano
1227 Biscayne Drive
Elk Grove Village, Illinois 60007

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *1/96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) In the (circle one) amount of $ *20.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *BENEFITS FOR VETERANS*
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes **No** (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) (c) or (d) (11) **(a) I was not given a receipt.** (b) I was given a receipt before I made the donation. (c) I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: _____

_____

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ C. Napolitano* Date: *7-31-96*
Daytime Phone # *312-424-4951*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Mrs. Frank McKee
101 Monticello Circle
Bolingbrook, Illinois 60440

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *2/1/96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) In the (circle one) amount of $ *20.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *HELPING VETERANS WHO ARE HOMELESS*
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes **No** (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) **(c)** or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. (c) I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: _____

_____

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Jacqueline McKee* Date: *7/29/96*
Daytime Phone # *708-759-4818*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Mr. Rob Mattison
9316 Western Avenue
Des Plaines, Illinois 60016

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *2-3-96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) In the (circle one) amount of $ *35.00* .

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *DON'T REMEMBER*

_____
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes **No** (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) (c) or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. (c) I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: _____

_____

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Robert Mattison* Date: *7-25-96*
Daytime Phone # *847-803-4390*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Mr. & Mrs. G. Maciag
7422 Iowa
River Forest, Illinois 60305

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contrib on to Viet Now on or about *2-1-96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) In the (circle one) amount of $ *35.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *HELPING VETERANS AND THEIR FAMILIES*
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes **No** (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) (c) or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. (c) I was given a receipt at the time I made the donation. **(d)** I was given a receipt after I made the donation.

OTHER COMMENTS: *SINCE MY HUSBAND IS A VIET NAM VET I TRY TO GIVE DONATIONS TO THE VETERANS - IF I KNEW THAT THEY WERE ONLY RECIEVING 20% OR LESS I WOULD NOT GIVE*

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Nina Maciag* Date: *July 25, 1996*
Daytime Phone # *708 771 0604*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Ms. Beverly Loveless
401 East Kenginston
Mt. Prospect, Illinois 60056

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *2/7/96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) (circle one) In the amount of $ *35.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for _____
_____
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes No (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) (c) or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. (c) I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: _____

_____

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Beverly Loveless* Date: *9/23/96*
Daytime Phone # *847 259-0534*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Ms. Loretta Long
448 Cambridge Way
Bolingbrook, Illinois 60440

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *2/96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) In the (circle one) amount of $*25.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *ASSISTANCE FOR VIETNAM VETERANS - FOOD & HOMELESS & GEN'L ASSISTANCE*
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes **No** (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) (c) or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. **(c)** I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: *I HAVE GIVEN FOR SEVERAL YEARS AM ARE TOLD HOW MY MONEY HELPED VETERAN THE YEAR BEFORE. (DONATIONS IN GEN)*

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Loretta Long* Date: *7/31/96*
Daytime Phone # *630-985-8669*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Ms. Charlene Lohnerer
420 Winnetka
Winnetka, Illinois 60093

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *8-22-95* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) In the (circle one) amount of $ *15.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *HELPING DISABLE CHILDREN*
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes No (8) I still have the materials sent to me. - *JUST THE RECEIPT THEY LEFT*

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) (c) or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. (c) I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: _____

_____

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Charlene Lohnerer* Date: *8-3-96*
Daytime Phone # *847-446-2098*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Frank Loesch
1440 Clear Drive
Bolingbrook, Illinois 60440

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *2/7/90* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave (a check) (cash) In the (circle one) amount of $_____.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *VETS - HOMELESS*

_____
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes **No** (8) I still have the materials sent to me. *TELEPHONE ONLY*

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) (c) or **(d)** (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. (c) I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: *THEY HAVE CALLED ME TWICE A YEAR, EVERY TIME ITS FOR $35 THEY SELL BAGS AND STUFF*

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Frank Loesch* Date: *7-25-96*
Daytime Phone # *708-773-8150*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Ms. Cindy Lambert
706 North Wheeling Road
Prospect Heights, Illinois 60070

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *FEB 1996* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) In the (circle one) amount of $*25.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *REHABILITATION & OTHER SERVICES FOR VIETNAM VETS* (please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now. *I SPECIFICALLY ASKED THAT QUESTION & WAS TOLD 90% OR MORE GOES TO THE VETS!!*

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes **No** (8) I still have the materials sent to me. *NOTHING WAS SENT TO ME.*

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) (c) or (d) (11) **(a)** I was not given a receipt. (b) I was given a receipt before I made the donation. (c) I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: *OBVIOUSLY VIETNOW WROTE THE RECEIPT (FOR $35) BEFORE I WROTE MY CHECK FOR $35 & NEVER GAVE ME ANYTHING - I AM ALSO ANGRY THAT THEY LIED TO ME ABOUT THE PERCENTAGE THAT BENEFITS THE VETS*

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Cindy Lambert* Date: *7/30/96*
Daytime Phone # *847-640-3816*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Ms. Lillian Johnsen
28470 W. Lindberg Drive
Barrington, Illinois 60010

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *Jan. '96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) In the (circle one) amount of $ *10.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *PARALYZED VETERANS OF AMERICA*
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes **No** (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check).

Yes **No** (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), **(b)** (c) or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. (c) I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: *WHEN I ASKED WHO THIS WAS FOR I WAS TOLD "PARALYZED VETS" NOT THE NAM "VIETNOW". I TOLD THEM I PROMISED NOTHING, BUT SEND ME LITERATURE AND I'D DECIDE WITH A MAXIMUM OF $10.THE INVOICE CAME WITH A PLEDGE OF $35 PAID $10 BY CHECK*

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Lillian Johnsen* Date: *7/26/96*
Daytime Phone # *847- 381-6694*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Ms. Susan Kerr
303 West Chicago Avenue
Westmont, Illinois 60559

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *1/28/96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) In the (circle one) amount of $ *25.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *HELPING VIETNAM VETERANS*
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes No (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) (c) or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. **(c)** I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: *THIS WASN'T THE FIRST TIME I GAVE TO VIET NOW THEY SOLICIT EVERY YEAR*

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Susan Kerr* Date: *8/3/96*
Daytime Phone # *(630) 971-0848*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Mr. Ronald Henderson
183 Pamela Drive
Bolingbrook, Illinois 60440

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *5-1-96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) In the (circle one) amount of $*15.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *TO HELP VIETNAM VETERANS*

(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes No (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) (c) or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. **(c)** I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: *I'M GLAD THAT THESE PHONE SOLICITATIONS ARE BEING LOOKED INTO FOR CALLS ARE FROM PROFESSIONAL, USING HIGH PRESURE.*

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Effie Henderson* Date: *8-1-96*
Daytime Phone # *630-960-9211 Ext. 54*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Ms. Barbara A. Hayward
411 North Washington
Westmont, Illinois 60559

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *2/2/96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) In the (circle one) amount of $ *25.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for _____

_____
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes No (8) I still have the materials sent to me. *(THEY STILL CALL)*

Yes No (9) I have the cancelled check (if payment was by check).

Yes **No** (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) (c) or **(d)** (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. (c) I was given a receipt at the time I made the donation. **(d)** I was given a receipt after I made the donation.

OTHER COMMENTS: *WE CERTAINLY WILL NOT BE DONATING TO THESE GROUPS AGAIN*

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Barbara A. Hayward* Date: *8/1/96*
Daytime Phone # *971-6056 (708)*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Mr. William A. Fumagali
212 East 56th Street
Westmont, Illinois 60559

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *2-2-96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) In the (circle one) amount of $ *25.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *HELPING THE VETERANS OF THE VIETNAM WAR AND THEIR FAMILIES*
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes **No** (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) **(c)** or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. (c) I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: *I WAS TOLD MY DONATION IS FULLY TAX DEDUCTIBLE*

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ William Fumagali* Date: *7/28/96*
Daytime Phone # *708-968-1303*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Ms. Susan Foltz
537 Emerson Circle
Bolingbrook, Illinois 60440

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *2/6/96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave (a check) **(cash)** (circle one) In the amount of $*20.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *VETERANS INTERESTS; VIETNAM VETERAN PROGRAMS; FOR THEIR FAMILIES*
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes **No** (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check). *CASH*

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) (c) or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. **(c)** I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: *THE "RECEIPT" SAYS IT'S TAX DEDUCTIBLE - IS IT ??*

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Susan Foltz* Date: *7/26/96*
Daytime Phone # *(708) 216-6954*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Mr. Patrick Finnegan
13256 Mulranny Drive
Lockport, Illinois 60441

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *10/21/95* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) In the (circle one) amount of $ *25.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *VIETNAM VETERANS AND THEIR FAMILIES*
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes **No** (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check).

Yes **No** (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), **(b)** (c) or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. (c) I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: *IF WE HAD KNOWN THAT THE MONIES WAS NOT USED PROPERLY I WOULD NOT HAVE CONTRIBUTED*

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Patrick Finnegan* Date: *8/15/96*
Daytime Phone # [omitted]

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Mrs. William Drew
113 Valley Drive
Bolingbrook, Illinois 60440

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about _____ (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) In the (circle one) amount of $ *15.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *TO HELP VIETNAM VETS.*
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes No (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) **(c)** or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. (c) I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: *THE PROFESSIONAL FUND RAISER WAS VERY PERSISTANT, EVEN AT PICKING UP THE MONEY AT THE DOOR HE POUNDED ON THE DOOR FOR ALONG TIME.*

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Mrs. William Drew* Date: *Aug. 12, 1996*
Daytime Phone # *630 668-8300 (202)*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Mr. Grier Davis
916 Maple Avenue
Evanston, Illinois 60202

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *Feb. 96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) In the (circle one) amount of $*25.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *AS I RECALL, FOOD BASKETS FOR VETERANS.* (please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes **No** (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) **(c)** or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. (c) I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: *I'M SYMPATHETIC TO THE CAUSE, BUT 80% FOR ADMDINISTRATION BORDERS ON FRAUD*

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Grier Davis* Date: *8/9/96*
Daytime Phone # *(847) 491- 5680 (W)*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Mr. Dan Cermak & Mary Cermak
Five South 202 Drendel
Downers Grove, Illinois 60515

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *1/30/96 & 3/16/96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) In the amount of $ *25.00* / *35.00* (circle one).

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *EASTER BASKETS*

(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes **No** (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) **(c)** or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. (c) I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: _____

_____

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Mary Cermak* Date: *7/27/96*
Daytime Phone # *708-968-6779*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Ms. Christine Blumka
5606 Lomond Avenue
Downers Grove, Illinois 60516

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *2/2/96, 7/15/94* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) In the (circle one) amount of $ *20.00* . *EACH SOLICITATION*

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *AID FOR VIETNAM VETERANS & THEIR FAMILIES*
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes No (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) (c) or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. (c) I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: *ATTACHED ARE COPIES OF THE MATERIALS GIVEN TO ME.*

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Kristine A. Blumka* Date: *8/3/96*
Daytime Phone # *(630) 769-3145*

SURVEY AFFIDAVIT
OFFICE OF THE ILLINOIS ATTORNEY GENERAL

Ms. Peggy A. Berent
205 West 57th Street
Westmont, Illinois 60559

Please circle "Yes" or "No" for each statement, or provide other information where applicable.

[Items circled by the affiant are in bold, while other information supplied by the affiant is italicized.]

Yes No (1) I, the undersigned, was solicited for a contribution to Viet Now on or about *2-2-96* (insert approximate date).

Yes No (2) The contribution was requested pursuant to a solicitation made by telephone.

Yes No (3) I gave **(a check)** (cash) (circle one) In the amount of $*25.00*.

Yes No (4) I gave the funds for charitable purposes only.

(5) I was told that my donation would be used for *HELPING LOCAL VIETNAM VETS*
(please state specific purpose, if any)

Yes **No** (6) I knew that 80% or more of my donation would be used for professional fund raising expenses and that only 20% or less would go to Viet Now.

Yes **No** (7) I would have given even if I knew that 80% or more of my contribution was to be used for professional fund raising expenses.

Yes **No** (8) I still have the materials sent to me.

Yes No (9) I have the cancelled check (if payment was by check).

Yes No (10) My donation was picked up by someone on behalf of the solicitor.

Circle (a), (b) **(c)** or (d) (11) (a) I was not given a receipt. (b) I was given a receipt before I made the donation. **(c)** I was given a receipt at the time I made the donation. (d) I was given a receipt after I made the donation.

OTHER COMMENTS: *ATTACHED ARE PAPERS GIVEN TO ME WHEN MY DONATION WAS PICKED UP.*

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this document are true and correct.

Signature: */s/ Peggy A. Berent* Date: *9-6-96*
Daytime Phone # *630-969-9020*

(8)

Supreme Court U.S.
FILED
DEC 21 2002
OFFICE OF THE CLERK

No. 01-1806

In the

Supreme Court of the United States

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, ATTORNEY GENERAL OF THE STATE OF ILLINOIS,

Petitioner,

v.

TELEMARKETING ASSOCIATES, INC., RICHARD TROIA and ARMET, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR PETITIONER

JAMES E. RYAN
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JOEL D. BERTOCCHI
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Attorneys for Petitioner

Printed by Authority of the State of Illinois (P.O. 30235—75—12-24-02)

60 pp

QUESTION PRESENTED

Whether the First Amendment categorically prohibits a State from pursuing a fraud action against a professional fundraiser who represents that donations will be used for charitable purposes but in fact keeps the vast majority (in this case 85 percent) of all funds donated.

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OPINIONS BELOW

The opinion of the Illinois Supreme Court is reported at 198 Ill. 2d 345 and 763 N.E.2d 289. Pet. App. 1-17. The opinion of the Illinois Appellate Court is reported at 313 Ill. App. 3d 559 and 729 N.E.2d 965. Pet. App. 19-29. The final judgment of the Illinois Circuit Court is unreported. Pet. App. 30-31.

JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1257(a). The judgment of the Illinois Supreme Court was entered on November 21, 2001. The Illinois Supreme Court denied the petitioner's timely petition for rehearing on February 2, 2002. Pet. App. 18. On April 25, 2002, Justice Stevens extended the time within which to file a petition for writ of *certiorari* to June 5, 2002. Petitioner on June 5, 2002 filed the petition for a writ of *certiorari*, which the Court granted on November 4, 2002.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

U.S. Const. amend. I.

STATEMENT OF THE CASE

Introduction

Telemarketing Associates, Inc. ("Telemarketing") is a for-profit company engaged in the business of telephoning people at home and asking for donations on behalf of various not-for-profit organizations. J.A. 2, 7, 8, 11. One of these organizations is VietNow, Inc., whose national headquarters is in Illinois. J.A. 3. Telemarketing calls individuals to ask for donations to VietNow, telling them that their contributions will be used for specific charitable purposes, including providing food, shelter and financial support for hungry, homeless and injured Vietnam War veterans. J.A. 107-194. In fact, pursuant to its agreements with VietNow, Telemarketing keeps 85 percent of the donations it generates. J.A. 3, 5, 84.

Petitioner, the People of Illinois *ex rel.* James E. Ryan, the Illinois Attorney General (the "State," or "Illinois"), sued Telemarketing, its owner, Richard Troia, and Armet, Inc., another company owned by Troia (collectively "Respondents"), alleging common law fraud as well as violations of several state anti-fraud statutes. J.A. 9, 10, 86-87. The State's complaint alleged that Respondents' representations to donors about how their contributions to VietNow would be used were false and misleading in light of Respondents' retention of 85 percent or more of those donations, J.A. 88, 103; that Respondents were aware of the deceptive nature of their representations, but nonetheless made them for the purpose of inducing people to make contributions for Respondents' financial gain, J.A. 86, 105; and that donors relied on the misleading impression created by Respondents' representations about how contributions would be used, J.A. 87, 104, 107-94, with the result that over the course of a number of years Respondents received more than $7 million donated to VietNow for the charitable purposes described to donors but turned over only about $1 million to VietNow. J.A. 3, 84.

Attached to the State's complaint are the affidavits of 44 donors identifying what they were "told [their] donation would be used for" (*e.g.*, providing rehabilitation services, job training, food baskets and financial support to disabled, homeless and unemployed veterans and their families), and affirming that they did not know—and would not have made a contribution if they had known—"that 80% or more of [their] donation would be used for professional fund raising expenses and that only 20% or less would go to VietNow." J.A. 107-94.

On Respondents' motion, the Circuit Court of Cook County, Illinois, dismissed the State's fraud claims as barred by the First Amendment. Pet. App. 30-31. The Illinois Appellate Court and the Illinois Supreme Court affirmed, holding that the State could prove no set of facts that would entitle it to relief consistent with the First Amendment. Pet. App. 1-29. This Court granted *certiorari* to review the constitutional question presented.

Allegations of the Complaint

The State's complaint alleged the following facts. Respondents Telemarketing and Armet are for-profit corporations wholly owned and controlled by Troia. J.A. 2. Before VietNow was organized as a not-for-profit corporation, it entered into a contract with Telemarketing to conduct fundraising activities on its behalf. J.A. 14, 20; Record 27-28. Telemarketing thereafter conducted ongoing fundraising campaigns for VietNow pursuant to successive contracts. Under every one of those contracts, covering a 13-year period, VietNow was entitled to receive only 15 percent of the money raised in its name, and Telemarketing kept the remaining 85 percent. J.A. 3, 94.

As part of their fund-raising activities, Respondents sometimes contracted with other individuals and entities, including other companies owned and controlled by Troia.

J.A. 103. Persons calling people at home to ask for contributions to VietNow often received up to 70 percent or more of every donation they generated. J.A. 7-8. Troia also set up additional VietNow chapters in other states for which Respondents raised money in the same fashion, with Troia, through Armet, receiving a separate fee of 10 percent to 20 percent of the money raised, and VietNow's share reduced to only 10 percent. J.A. 4; Record 29-67.

Telemarketing's contracts with VietNow stated that Telemarketing was required to "promote goodwill," "enhance good public relations through [its] sales techniques," and "increas[e] public awareness and financial support for the organization." J.A. 22, 33, 91. These contracts also required Telemarketing to market advertising space for, and annually publish, a maximum of 2,200 copies of a magazine mostly containing commercial advertisements, with a dozen pages reserved for content supplied by VietNow. J.A. 22, 32, 90. Because Illinois' complaint was dismissed at the pleading stage, the record does not reflect the extent to which Respondents actually engaged in any activities on VietNow's behalf besides merely raising money.

When Respondents called potential donors asking for contributions to VietNow, they did not state that they were for-profit fundraisers, J.A. 10, and they told donors to send checks or money orders payable to VietNow. J.A. 94. Respondents then directly deposited these checks into accounts that were established in VietNow's name but were exclusively controlled by Respondents. J.A. 102. Respondents took their 85 percent or 90 percent share of these deposits (for in-state and out-of-state revenues) and remitted the remaining 15 percent or 10 percent to VietNow. J.A. 4-5, 84, 102.

After Respondents developed a donor list of people who contributed to VietNow, they called the same people in succeeding years, so that a given amount of fundraising effort generated a substantially greater amount of donations. J.A.

102-03, 111. What was turned over to VietNow, however, never changed, so that what VietNow received in the tenth year of Telemarketing's fundraising contracts was the same as it received in the first year: 15 percent of all the money raised in its name. J.A. 94, 102-03, 111. (The figures for each year after 1989, showing the revenue raised and the percentage turned over to VietNow, are set forth in the complaint and reproduced at J.A. 84.) Respondents also maintained control over the donor list and did not disclose donors' names to VietNow. J.A. 93-94, 102-03.

When Respondents called potential donors, Respondents told them, among other things, that their contributions would be used to provide support for Vietnam War veterans who were "disabled," "paralyzed," "injured," "homeless," "unemployed" or otherwise "in need." J.A. 107, 113, 117, 125, 129, 131, 133, 155, 163, 167, 171-72. Respondents further described specific types of support that would be given to needy veterans and their families, including "rehabilitation services," "job training," "food baskets" and "assistance" to help pay "rent" and other "bills." J.A. 124, 131, 133, 135, 145, 163, 169, 187, 189. In making these representations, Respondents knew, but did not tell donors, that VietNow would receive at most 15 percent of the contributions raised in its name. J.A. 86, 105. Respondents further knew that, as a result of their representations and omissions about how donations would be used, donors actually believed that "much more" of their contributions would be used for the specific charitable purposes described to them than was actually the case. J.A. 20, 87-88, 104. Respondents nonetheless made these representations and omissions for the purpose of inducing donors to contribute money for Respondents' financial gain (J.A. 86, 104); donors materially relied on the false impression created by Respondents' conduct by making contributions to VietNow (J.A. 87, 104); and donors would not have made such contributions if they had known that at most only

15 percent of their donations actually went to VietNow to be used as Respondents represented. J.A. 107-194.

Based on these allegations, the State's complaint asserted that Respondents' conduct amounted to common law fraud and also violated the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 505/1 *et seq.* (1996); Section 2 of the Uniform Deceptive Trade Practices Act, 815 Ill. Comp. Stat. 510/2 (1996); and section 15(b)(5) of the Illinois Solicitation for Charity Act, 225 Ill. Comp. Stat. 460/15(b)(5) (1996), which states that when fundraisers purport to relate to prospective donors the purpose for which donations are being solicited, they must "fully and accurately identif[y]" such purposes. J.A. 9, 86-87.

The complaint also alleged that Respondents, by taking possession of assets contributed for specific charitable purposes, were trustees of those assets for the benefit of the people of Illinois, and that they breached their fiduciary duty of loyalty to the people by engaging in self-dealing and devoting those assets to private purposes materially different from the specific charitable purposes for which they were donated. J.A. 3, 9, 10, 85, 105.

The State sought as relief compensatory and punitive damages, a declaration that Respondents had breached their fiduciary obligations and equitable remedies, including an accounting, injunctive relief, forfeiture of compensation and the imposition of a constructive trust on the monies they received for charitable purposes. J.A. 12-13, 88, 106.

The Illinois Supreme Court's Decision

On appeal, the Illinois Supreme Court affirmed the dismissal of the complaint. Although it "accepted as true" the State's allegations, Pet. App. 4, and applied a stringent standard of review, stating that "[d]ismissal will be held proper only if it clearly appears that no set of facts can be proved under the pleadings which will entitle the plaintiff to

recover," Pet. App. 5, it concluded that this Court's rulings in *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980), *Secretary of State of Maryland v. Joseph A. Munson Co.*, 467 U.S. 947 (1984), and *Riley v. National Fed'n of the Blind of North Carolina*, 487 U.S. 781 (1988), "compel[led]" the result it reached. Pet. App. 17.

Rejecting the State's argument that this Court specifically approved an individual fraud action like this one as a narrowly tailored means to further its interest in protecting the public from fraud, the Illinois Supreme Court held that "the Attorney General's complaint is, in essence, an attempt to regulate the defendants' ability to engage in a protected activity based upon a percentage-rate limitation [which] is the same regulatory principle that was rejected in *Schaumburg*, *Munson* and *Riley*." Pet. App. 13. Thus, the court concluded, the State's claim was "indistinguishable from the regulatory measures struck down" in those cases. Pet. App. 17. Allowing a case such as this to proceed, the court said, would have a "substantial chilling effect on protected speech" because "[f]und-raisers, therefore, would be at a constant risk of incurring litigation costs, as well as civil and criminal penalties, . . . whenever in the Attorney General's judgment the public was being deceived about the charitable nature of a fund-raising campaign because the fund-raiser's fee was too high." Pet. App. 16.

Focusing on the State's actual fraud allegations, the court acknowledged the donor affidavits referred to in the State's complaint and attached to it. Pet. App. 6. It observed, though, that "the statements made by the defendants during solicitation are alleged to be 'false' only because the defendants retained 85 percent of the gross receipts and failed to disclose this information to donors." Pet. App. 13. That premise of Illinois' complaint was inconsistent with this Court's precedents, the Illinois Supreme Court held, because "fraud cannot be defined in such a way that it places on solicitors the

affirmative duty to disclose to potential donors, at the point of solicitation, the net proceeds to be returned to the charity." Pet. App. 15. Any reliance on Respondents' 85 percent fundraising fee to prove they committed fraud, the court held, constitutes "an attempt to regulate the defendants' ability to engage in a protected activity based upon a percentage-rate limitation" and incorrectly "presume[s] that there is a nexus between high solicitation costs and fraud." Pet. App. 13, 17. Observing that Respondents' contracts provided for them to do more than just raise money, the court also found that the State's claim was tantamount to a form of "[c]ompelled disclosure . . . based on the presumption that the net proceeds returned to a charity are the only benefit that a charity derives from solicitation." Pet. App. 15.

Summarizing its decision, the court stated:

> Contrary to the Attorney General's contentions, the complaint . . . is, at its core, a constitutionally impermissible percentage-based limitation on defendants' ability to engage in a protected activity. As such, the complaint is constitutionally deficient pursuant to *Schaumburg*, *Munson*, and *Riley*.

Pet. App. 17.

The court said it was "mindful of the opportunity for public misunderstanding and the potential for donor confusion which may be presented with fund-raising solicitations of the sort involved in the case at bar." Pet. App. 17. It nonetheless declared that, in its view, that consequence is "compel[led]" by this Court's decisions in *Riley*, *Munson* and *Schaumburg*. Pet. App. 17.

SUMMARY OF ARGUMENT

The First Amendment does not give a fundraiser the right to solicit charitable donations by fraudulent means, including misrepresentations about how donated funds will be used. Deception for profit is not protected speech under the First Amendment, and this is as much the case for half-truths and other implied misrepresentations long-recognized at common law as it is for blatant lies. That such fraud is perpetrated by someone seeking money in the name of charity does not make it protected speech.

Consistent with these principles, the Court has repeatedly stated that States may vigorously enforce their anti-fraud laws against deceptive fundraising practices committed in the name of charity. States therefore may bring an individual fraud action against a professional fundraiser who represents that donations will be applied to specific charitable uses but actually keeps virtually all of the money donated. That is what Illinois properly did here.

It is firmly established under the law of fraud in Illinois and in other jurisdictions that a misrepresentation need not consist of an explicit misstatement of fact, but may include any manner of words or conduct—including an ambiguous statement or selective, partial disclosure—which reasonably implies an assertion of fact that is verifiably false. See, *e.g.*, Restatement (2d) of Torts § 525, cmt. b (1977); Dan B. Dobbs, *The Law of Torts* § 469 at 1344 (2000) ("*Dobbs*") (observing that, under the law of fraud, "[a]n implication of fact rather than an explicit statement will do."). Consistent with these principles, Illinois alleged that when Respondents told donors their contributions would be used for specific purposes, such as providing rehabilitation services, job training, food and rent money to needy veterans, the donors reasonably understood Respondents' statements to mean that much more than 15 percent of their donations would be spent by VietNow for those specific uses. Illinois further alleged that these repre-

sentations by Respondents were false and misleading in light of the exceedingly small portion of donations they actually turned over to VietNow. While the Illinois Supreme Court did not dispute that Illinois stated a valid fraud claim under state law, it erred in concluding that this claim infringed Respondents' First Amendment rights.

Although charitable solicitations constitute speech protected by the First Amendment, fraudulent charitable solicitations, like other forms of deception for pecuniary gain, are unprotected speech that government has a "substantial interest" in preventing. *Riley*, 487 U.S. at 792. That interest encompasses any words or conduct reasonably understood to represent an assertion of fact that is demonstrably untrue, not just blatant falsehoods.

An individual fraud action—in which the determination whether fraud occurred is decided after a trial based on the particular facts and circumstances of a specific case in accordance with well-established legal principles—represents a constitutionally valid, narrowly tailored means to further the substantial governmental interest in prohibiting fraudulent charitable solicitations. See, *e.g.*, *Riley*, 487 U.S. at 795, 800; *Schaumburg*, 444 U.S. at 637 n.11. Free speech interests do not, as Respondents maintain, require going beyond the normal protections afforded in such an action and providing blanket immunity for implied misrepresentations, such as deceptive half-truths, made for the purpose of obtaining donations to charity.

The public interest in preventing charitable solicitation fraud increases, and the free speech interest of fundraisers decreases, where the fundraiser's alleged misrepresentation relates to how a donation will be used. That use is often the most important factor in a person's decision to make a gift, yet donors typically have even less opportunity than consumers of goods and services to know the truth about what their money is reportedly going to obtain. Moreover, whereas a

fundraiser has the ability to obtain accurate information about the actual use of charitable donations and so can easily avoid making deceptive statements about such expenditures, donors have significantly less access to such information and, given the one-on-one nature of many charitable solicitations, are unlikely as a practical matter to obtain other information correcting any misleading representations by the solicitor before deciding to make a donation. Given these circumstances, limiting charitable solicitation fraud liability as a matter of constitutional law to explicit falsehoods is unnecessary to the protection of legitimate charitable solicitations, and instead would simply encourage the abusive exploitation of the public's desire to support charitable causes.

Contrary to the Illinois Supreme Court's ruling, the State's claim against Respondents does not improperly rely on the amount of their fee to establish that they committed fraud. *Schaumburg*, *Munson* and *Riley* held that the percentage of donations devoted to fundraising expenses cannot, *by itself*, be used to declare charitable solicitations fraudulent. These decisions did not hold that the share of donations used for fundraising expenses is categorically *irrelevant* to whether a fundraiser commits fraud. Because Respondents specifically told donors how their contributions would be used, Illinois necessarily may support its claim that these representations were materially false with evidence regarding the percentage of donations that Respondents actually turned over to VietNow and, conversely, the percentage Respondents kept. Such use of Respondents' fee as evidence to support Illinois' fraud claim is not tantamount to reliance on an unconstitutional legal "presumption" that their fee establishes fraud. Finally, the general First Amendment prohibition against "compelled speech" is not violated by Illinois' claim that Respondents committed fraud by obtaining donations for charity with deceptive half-truths about how those donations would be used.

ARGUMENT

The First Amendment Does Not Give a Person the Right to Solicit Charitable Donations with Fraudulent Misrepresentations About How Donated Funds Will Be Used.

Fraudulent charitable solicitations are not protected speech under the First Amendment, but instead represent speech the Government has a substantial interest in prohibiting. Individual fraud actions, in which well-established legal principles are applied to the particular facts and circumstances of a given case, are a narrowly tailored means to accomplish this objective. These principles fully apply where charitable donations are solicited with deceptive half-truths or similar misrepresentations about how donations will be used.

The State's complaint alleges that Respondents, for the purpose of inducing people to give money to VietNow, told them a number of specific things about how their donations would be spent. As particularly set forth in the affidavits referred to in the body of the complaint and attached to it, Respondents represented to donors that the money they were being asked to donate would be used to furnish assistance to disabled, homeless, unemployed and other needy Vietnam War veterans and their families by providing them with rehabilitation services, job training, food baskets and money to pay rent and other bills. Told that their contributions would be used for these specific charitable purposes , donors justifiably believed that "much more" than 15 percent of their contributions would be spent by VietNow for those purposes. J.A. 87-88. In fact, under the terms of Respondent's contracts with VietNow, at most 15 percent of these donations would ever be delivered to VietNow, and after allowing for VietNow's own administrative expenses, the portion actually used for these purposes was likely to be substantially

less. Moreover, because the State's complaint alleges that Respondents were aware of the false impression they created and intended to induce members of the public to rely on this false impression so that Respondents could gain financially from it, what Respondents did tell donors was at best a half-truth and, under long-established legal principles, a fraudulent misrepresentation. Such deceptive misrepresentations are not protected speech, but instead unprotected fraud that the State may validly proscribe. *Riley*, 487 U.S. at 795, 800; *Schaumburg*, 444 U.S. at 637 and n.11. The Illinois Supreme Court's decision was inconsistent with these principles and should, therefore, be reversed.

I. Fraudulent Charitable Solicitations Are Unprotected Speech that Government Has a Substantial Interest in Prohibiting.

A. Deception for Profit Is Not Protected Speech Under the First Amendment.

Fraudulent charitable solicitations are not protected speech under the First Amendment. "[F]alse statements of fact . . . belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)); see also *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake.").

The exclusion of First Amendment protection for false statements of fact is particularly justified when they are used to deceive another person into giving up money or property, including a charitable gift. See, *e.g.*, *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S.

150, ___, 122 S. Ct. 2080, 2087-88 (2002) (acknowledging the government's ability "to protect its citizens from fraudulent solicitation") (citing *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940)); *Riley*, 487 U.S. at 800 ("the State may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements."); *Schaumburg*, 444 U.S. at 637 (1980) ("Fraudulent misrepresentations [by solicitors] can be prohibited and the penal laws used to punish such conduct directly") (citing, *inter alia*, *Virginia Pharmacy Bd.*, 425 U.S. at 771). As Professor Schauer has noted:

> Courts of necessity must determine the factual truth of statements when dealing with areas in which the factual falsity of written or spoken words gives rise to substantive liability. Fraud, deceit, misrepresentation and obtaining money by false pretenses are obvious examples. In each of these cases speech serves no public purpose and any claim of first amendment protection for such utterances would be frivolous.

Frederick Schauer, *Language, Truth and the First Amendment: An Essay in Memory of Harry Canter*, 64 Va. L. Rev. 263, 276 (1978).

Because fraud is one of those rare categories of speech that is unprotected *because of* its content, government has, by definition, a substantial interest in prohibiting it. This is no less true where fraud is used to obtain money in the name of charity. Squarely addressing this issue, the Court in *Riley* held: "The interest in protecting charities (and the public) from fraud is, of course, a sufficiently substantial interest to justify a narrowly tailored regulation." *Riley*, 487 U.S. at 792; see also *Schaumburg*, 444 U.S. at 637 (acknowledging the government's "legitimate interest in preventing fraud").

B. Under Long-Established Fraud Principles, Half-Truths and Other Implied Assertions of Verifiably False Facts Constitute Actionable Misrepresentations.

The strong public policy against fraud, rooted in the most basic moral principles,[1] has been recognized in the law for centuries,[2] and is currently widely reflected both in the common law[3] and in civil and penal statutes.[4] This policy extends not only to blatant lies, but also to fraud accomplished through deceptive half-truths and other misleading factual implications. There is, therefore, no legal or logical support for Respondents' contention that, "where the Fundraisers' conduct does not include *affirmative misrepresentations*, this conduct is protected by the First Amend-

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[1] See, *e.g.*, Francis Bacon, *Essays, Civil and Moral* (P.F. Collier & Son, 1914) Chap. 56, *Of Judicature* ("The principal duty of a judge is to suppress force and fraud; whereof force is the more pernicious when it is open, and fraud when it is close and disguised."); Aristotle 2, *Rhetoric*, Book 1, ch. 5 (M. Adler ed., 2d ed. 1990) ("a party to a contract may be the victim of either fraud or force").

[2] See, *e.g.*, J. Story, *Commentaries on Equity Jurisprudence*, § 186 (1884) ("*Story on Equity*"); M. Bigelow, 1 *A Treatise on the Law of Fraud on the Civil Side*, at 3-4 (1890) ("*Bigelow*"); James Kent, II *Commentaries on American Law*, Lecture XXIX.5 (1827).

[3] See *Neder v. United States*, 527 U.S. 1, 20-23 (1999); Restatement (2d) of Torts, scope note to Chap. 22; W. Keeton, *et al.*, *Prosser and Keeton on The Law of Torts* § 105 at 725-26 ("*Prosser*").

[4] See, *e.g.*, 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 1343 (wire fraud); 18 U.S.C. § 1014 (bank fraud); 18 U.S.C. § 1001 (fraudulent statements or representations to the federal government); 15 U.S.C. §§ 45, 52 (deceptive acts or practices in or affecting commerce); 2 Model Penal Code § 223.3 ("theft by deception"), codified in Illinois at 720 Ill. Comp. Stat. 5/16-1(a)(2) (2000).

ment." (Brf. in Op. 7 (emphasis in original).) The Court should accordingly reject as unsound, and contrary to widely embraced standards of morality and social order, the notion that fraudulent charitable solicitations are unprotected speech only where they rely on explicit literal falsehoods.

Because Respondents told donors their money would be spent on specific charitable uses and in reality only a trifling amount of it was used in that fashion, it can be argued that these representations were literally false. That donors naturally assumed *some* portion would be used for other expenses does not make these representations true no matter how little was actually used as Respondents represented. It does not matter, however, whether Respondents' statements are characterized as "explicit" or "implicit" misrepresentations, as that distinction does not change their legal significance under common law fraud principles and, likewise, should not be elevated to one of constitutional significance for claims of charitable solicitation fraud. The absurdity of such a distinction is highlighted by Respondents' contention at oral argument before the Illinois Supreme Court that the First Amendment would protect them from liability even if they keep *99 percent* of all the donations they solicited. Under this view, the power reserved to States to pursue actual fraud becomes no power at all.

Although most jurisdictions define the offense of perjury to require a positive assertion of facts known by the witness to be false,[5] liability for fraud, which serves significantly different objectives, has historically been defined to reach a

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[5] See , *e.g.*, *Bronston v. United States*, 409 U.S. 352, 357-59 and n.4 (1973) (construing 18 U.S.C. § 1621); Annotation: *Incomplete, Misleading or Unresponsive but Literally True Statement as Perjury*, 69 ALR3d 993 § 3 (1976); see also S. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud and False Statements*, 53 Hastings L. J. 157, 173-98 (2001).

wider category of deceptive words and conduct, including a number of well-recognized forms of implied falsehood. As Professor Dobbs notes, under the law of fraud "[a]n implication of fact rather than an explicit statement will do." *Dobbs* § 469 at 1344 (2000); see also Restatement (2d) of Torts § 525, cmt. b.[6] Indeed, this definition of what constitutes a "misrepresentation" under the common law of fraud has been established since at least the early nineteenth century.[7]

The common elements of such implied misrepresentations are words or conduct that, in the particular circumstances present, reasonably create a misleading impression regarding a verifiably false fact. Restatement (2d) of Torts § 525, cmts. b-e; *Prosser* § 106 at 736, §109 at 775; 37 C.J.S. *Fraud* §§ 11, 12, 17 (1997); *American Law of Torts* § 32:14.[8] It is the courts' responsibility to ensure that the allegedly misleading meaning attributed to a party's words or conduct is both reasonable and sufficiently definite to be proved factually untrue; but in many cases these requirements are satisfied and a trial is necessary to determine, based on the particular

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[6] To the same effect are *Prosser* § 106 at 736-37, and 9 S. Speiser, C. Krause and A. Gans, *The American Law of Torts* §§ 32:13, 32:45 (1992) ("*American Law of Torts*").

[7] See *Bigelow* at 466-67; *Story on Equity* § 192 ("the misrepresentation may be as well by deeds or acts, as by words; by artifices to mislead, as well as by positive assertions"); James Kent, II *Commentaries on American Law*, Lecture XXIX.5.

[8] See also *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 188-89 (1948) ("Questions of fraud may be determined in the light of the effect advertisements would most probably produce on ordinary minds.") (citations omitted); *Bigelow* at 500-01; cf. *Federal Trade Comm'n v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 39-42 and nn.2, 4 (D.C. Cir. 1985) (Scalia, J.) (describing process under 15 U.S.C. § 45(a)(1) for ascertaining the public's actual understanding of advertisements).

events and circumstances in dispute, not only what statements were made, but also how they were *actually* understood. See 37 C.J.S. *Fraud* § 17; *Bigelow* at 140, 500-01; see also *Federal Trade Comm'n v. Colgate-Palmolive Co.*, 380 U.S. 374, 386 (1962); *Donaldson*, 333 U.S. at 189.[9] These principles are consistent with, not preempted by, the First Amendment.

If a statement is reasonably understood as implying an assertion of fact, it is not categorically exempt from being an actionable misrepresentation merely because that assertion is not made explicitly. Thus, a statement that is facially ambiguous nonetheless is treated as a misrepresentation where the meaning intended or reasonably understood in the circumstances is demonstrably false.[10] Similarly, an assertion conveying an approximate meaning constitutes a misrepresentation if the truth differs markedly from the meaning

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[9] Addressing a virtually identical issue, the the law of defamation has adopted similar principles. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990) (describing "[t]he dispositive question" as "whether a *reasonable* factfinder could conclude that the statements . . . *imply* an assertion that petitioner Milkovich perjured himself in a judicial proceeding") (emphasis added); *Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984; *id.* at 331 and n.5 (Bork, J., concurring); Restatement (2d) of Torts § 563 *et seq.*; R. Sack, *Sack on Defamation* § 2.4.5 (3d ed. 1999).

[10] See Restatement (2d) of Torts § 527; 37 C.J.S. *Fraud* § 23 ("One using ambiguous language cannot escape liability for fraud on the ground that no misstatement was intended if the misleading meaning is to be reasonably inferred from the language used"); *Prosser* § 106 at 736; *Dobbs* § 471 at 1346; *American Law of Torts* § 32:14; *Bigelow* at 499-500.

reasonably understood.[11] Indeed, not everything that may be labeled an "opinion" is immune from liability, as many such opinions directly imply underlying facts.[12] A prediction or promise also may clearly imply that the author is unaware of any facts that would prevent fulfillment of the promise or prediction, in which case the statement is a misrepresentation if the author actually knows of such facts when he makes the statement.[13] It is widely recognized, too, that fraud may

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[11] See, *e.g.*, *Dobbs* § 478 at 1366 (noting that statements in the form of an approximation are "not actionable so long as they are what they purport to be—approximately correct" and "do[] not exceed the tolerance for error the parties expect"); *Bigelow* at 470-72. On this point, *Bigelow* notes (at 470):

> The rule indeed of certainty in the representation is not to be understood in mathematical sense; it is not necessary that there should be absolute certainty in the form or matter of the representation. If there be practical certainty, that is enough; the real consideration is whether, of itself, the representation is such as would be apt to induce action on the part of the average man.

Thus, to the extent Respondents' claim rests on the proposition that nothing is false which is partially true, in however small a degree (see above at 16), it is not supported by the common law.

[12] Restatement (2d) of Torts § 539; *Bigelow* at 472-83; *Dobbs* § 477; 37 C.J.S. *Fraud* § 13 a.; cf. *Milkovich*, 497 U.S. at 18 ("expressions of 'opinion' may often imply an assertion of objective fact").

[13] See, *e.g.*, Restatement (2d) of Torts § 525, cmt. f; *id.* § 530; *American Law of Torts* § 32:17; 37 C.J.S. *Fraud* §§ 14 b, 15; *Bigelow* at 473-77, 483-86; *Burland v. United States*, 161 U.S. 306, 313-14 (1896) (construing mail fraud statute then in effect to include promises made with no present intent to fulfill them); *United States v. O'Boyle*, 680 F.2d 34, 36 (6th Cir. 1982); 2 Model Penal Code and Commentaries § 223.3, cmt. b at 187-190 (1980) (describing crime of false pretenses based on sham promises).

arise from statements that are literally true. While mere silence is generally insufficient to establish fraud, one who speaks is not free to make a selective disclosure of facts that creates a false impression in light of other information withheld.[14] This principle is specifically recognized in Illinois,[15] in other states,[16] and in numerous federal court decisions.[17] In all of these cases, well-established law classifies

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[14] See Fleming James, Jr. and Oscar S. Gray, *Misrepresentation—Part II*, 37 Md. L. Rev. 488, 523-26 (1978); Restatement (2d) of Torts § 529; *Prosser* § 106 at 736-38; *Dobbs* § 481 at 1375; *American Law of Torts* §§ 32:16, 32:47, 32:71; 37 C.J.S. *Fraud* §§ 21, 24; *Bigelow* at 503-04; *United States v. O'Boyle*, 680 F.2d at 36.

[15] See, *e.g.*, *In re Witt*, 145 Ill. 2d 380, 390, 583 N.E.2d 526, 531 (1991); *Glazewski v. Coronet Ins. Co.*, 108 Ill. 2d 243, 250, 483 N.E.2d 1263, 1266 (1985); *People v. Gilmore*, 345 Ill. 28, 46, 177 N.E.2d 710 (1931); *Buechin v. Ogden Chrysler-Plymouth, Inc.*, 159 Ill. App. 3d 237, 247-48, 511 N.E.2d 1330, 1336 (1987).

[16] See, *e.g.*, *Bond v. Graf*, 163 Or. 264, 272-73, 96 P.2d 1091, 1094-95 (1939); *Associated Indem. Corp. v. Del Guzzo*, 195 Wash. 486, 509-10, 81 P.2d 516, 526 (1938); *Ottinger v. Bennett*, 203 N.Y. 554, 555, 96 N.E. 1123, 1124 (1911); *Murphy v. McIntosh*, 199 Va. 254, 260-62, 99 S.E.2d 585, 589-91 (1957); *Sullivan v. Ulrich*, 326 Mich. 218, 227-30, 40 N.W.2d 126, 131-32 (1949).

[17] See, *e.g.*, *Bronston*, 409 U.S. at 358 n.4; *Donaldson*, 333 U.S. at 188-89 (observing that communications "as a whole may be completely misleading although every sentence separately considered is literally true"); *Equitable Life Ins. Co. of Iowa v. Halsey, Stuart & Co.*, 312 U.S. 410, 426 (1941) ("a statement of a half-truth is as much a misrepresentation as if the facts stated were untrue") (applying Iowa law); *Wiser v. Lawler*, 189 U.S. 260, 264 (1903) (characterizing as a "gross fraud" prospectuses which, while not containing a "distinct assertion" of untrue fact, necessarily "produced upon the ordinary mind" a misleading inference and were "more damaging in their omissions than in their statements").

such implied assertions of verifiably untrue facts as actionable misrepresentations.

Beyond demonstrating society's significant interest in protecting its citizens against deceptive conduct that causes them economic injury, the foregoing principles of law, worked out over generations, recognize the almost infinite variations of human language and non-verbal communication,[18] as well as the corresponding multitude of ways in which ingenious swindlers and con artists may defraud others.[19] Thus, in each case a determination of the meaning attributed to specific words and conduct depends not just on the language used, but also on how such language is reasonably interpreted by the listener in the specific context of the particular facts and circumstances of the situation.[20] It is for this reason that cases like the present one should be tried, not dismissed on the pleadings.

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[18] See *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.); *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 426-27 (1992) (Stevens, J., concurring); *Ollman*, 750 F.2d at 978.

[19] See *McClellan v. Cantrell*, 217 F.3d 890, 893 (7th Cir. 2000) ("Fraud . . . embraces all the multifarious means which human ingenuity can devise . . . to gain an advantage over another by false suggestions or by the suppression of truth.") (Posner, J.); *Kugler v. Romain*, 58 N.J. 522, 544, 279 A.2d 640, 652 (1971) ("[f]raud is infinite in variety"); *American Law of Torts* § 32:5 ("fraud is ever assuming new forms").

[20] Succinctly expressing this point, *Bigelow* states (at 503):

> The rule fixing liability for false representations . . . is not to be evaded by any suggestion that the representation is capable of being understood, as by a merely literal interpretation, or by some forced meaning, in a sense to make it true. If it wear a garb which under the circumstances would deceive a man of fair intelligence, it is false under the law.

C. Deceptive Half-Truths About How Charitable Donations Will Be Used Are Not Constitutionally Protected Speech.

Against this legal background, the Court's prior decisions strongly indicate its rejection of the notion that charitable solicitation fraud accomplished by means of an *implied* misrepresentation is protected speech or that government has no legitimate interest in prohibiting it. In *Riley*, the Court affirmed that States may "vigorously enforce [their] antifraud laws to prohibit professional fundraisers from obtaining money *on false pretenses* or by making false statements." 487 U.S. at 795 (emphasis added). In *Schaumburg* the Court recognized the States' power to prohibit and punish "fraudulent misrepresentations," 444 U.S. at 637, and commented approvingly on a law making it "unlawful for a . . . solicitor to *cheat, deceive or fraudulently misrepresent*." *Id.* at 637 n.11 (emphasis added). In making these statements, the Court did not suggest that it intended to depart from the common meaning of these terms by limiting them to explicit misstatements, as opposed to deceptive half-truths and other types of implied falsehoods long recognized in the law of fraud. See also *Watchtower Bible & Tract Society*, 536 U.S. at ___, 122 S. Ct. at 2087-88 (acknowledging the government's ability "to protect its citizens from fraudulent solicitation") (citing *Cantwell*, 310 U.S. at 306; *Bronston*, 409 U.S. at 358 n.4 (distinguishing the strict standard for establishing perjury under 18 U.S.C. § 1621 from the criminal law regarding fraudulent statements, which includes the "intentional creation of false impressions by a selection of literally true representations").

If, however, the Court's prior decisions leave any doubt on the subject, it should now squarely hold that fraudulent charitable solicitations—*including* ones based on implied misrepresentations—are unprotected speech, and that States therefore may pursue a fraud action against a fundraiser who

represents that donations will be used for specific charitable purposes but actually keeps the vast majority of the money donated for those purposes. Words used to obtain property that reasonably imply verifiably false facts constitute an affront to society's fundamental moral values and make no meaningful contribution toward an accurate understanding of actual conditions and events. Cf. *Gertz*, 418 U.S. at 340; *Chaplinsky*, 315 U.S. at 572. Unlike pure opinions and ideas, statements that are reasonably understood to imply untrue facts do not qualify as protected speech merely because the author refrains from asserting those facts explicitly. Cf. *Milkovich*, 497 U.S. at 18-21; *Riley*, 487 U.S. at 803 (Scalia, J., concurring). No constitutional premium therefore attaches to deception for pecuniary gain merely because it is accomplished by artful or clever means. Cf. *American Home Products Corp.*, 577 F.2d at 165 (observing that limiting fraud liability to "literal falsehoods" simply shields from scrutiny the "clever use of innuendo, indirect intimations, and ambiguous suggestions . . . when protection against such sophisticated deception is most needed.").

II. Illinois' Individual Fraud Action Against Respondents Represents a Narrowly Tailored Means to Further its Substantial Interest in Prohibiting the Solicitation of Charitable Donations by Fraudulent Means.

As unprotected speech, fraudulent charitable solicitations may be prohibited by means that are "narrowly tailored" to further the State's objective, *Riley*, 487 U.S. at 792, and that do not "unduly . . . intrude upon the rights of free speech," *Schaumburg*, 444 U.S. at 633. In *Schaumburg*, *Munson* and *Riley* the Court specifically indicated that individual fraud actions are a narrowly tailored means to achieve the States' legitimate goal of combating charitable solicitation fraud. *Riley*, 487 U.S. at 795, 800; *Munson*, 467 U.S. at 961 n.9; *Schaumburg*, 444 U.S. at 637 and n.11. Illinois' fraud action

against Respondents therefore represents exactly what the Court has said was permissible, and the Court should now specifically hold that an individual fraud action like the one Illinois initiated here satisfies the First Amendment.[21]

A. The First Amendment's "Narrowly Tailored Means" Standard Only Requires Substantive and Procedural Rules that Avoid Infringing a Substantial Amount of Protected Speech.

"There is always in litigation a margin of error." *Speiser v. Randall*, 357 U.S. 513, 525 (1958); see also F. Schauer, *Fear, Risk and the First Amendment: Unravelling the*

[21] The gist of Illinois' fraud action is not that, because Respondents take 85 percent of all donations (and VietNow then devotes only *one-fifth* of the remaining 15 percent—or *3 percent of the total*—to charitable programs of any kind, including public education efforts), it is therefore fraudulent even for them *generally* to solicit donations "for" charity. See *Schaumburg*, 444 U.S. at 637 (noting distinction between bona fide charities with high expenses for education, research, education and "organizations . . . that in fact are using the charitable label as a cloak for profitmaking"); *Munson*, 467 U.S. at 961; *Riley*, 487 U.S. at 804 (Scalia, J. concurring). Such a claim is certainly plausible, and perhaps even compelling in the present situation. (VietNow's annual IRS Form 990 for the year 2000, showing that it had revenues of more than $3.5 million but devoted only about $118,000—or approximately *three percent* of its revenues—to "program services," is available on the internet at http://justice.hdcdojnet.state.ca.us/charitysr/default.asp.) Illinois' claim in *this* case, though, is based on Respondents' *actual* representations that donations would be spent on *specific* charitable uses, such as providing food, shelter and financial support to needy veterans. This claim is further supported by the fact that although Respondents obtained a higher yield from their fund-raising efforts by repeatedly calling the same donors, they still turned over only 15 percent to VietNow and continued to make the same representations to these donors about how their contributions would be used.

"Chilling Effect," 58 B.U. L. Rev. 685, 694-705 (1978) (*"Unravelling the Chilling Effect"*); cf. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596-97 (1993). Even when First Amendment rights are at issue, therefore, the Constitution does not require rules that eliminate *any* possibility of civil or criminal liability being imposed on speech that is, in fact, protected. Nor does the Constitution demand rules under which those who engage in protected expression are *never* subject to judicial proceedings brought to determine whether their speech is actually unlawful. Obviously, such rules would, through protective overkill, virtually eliminate society's ability to prohibit unprotected speech.

Acknowledging this practical reality, the Court has held that, where the law must distinguish between protected and unprotected speech, the First Amendment requires rules which do not prohibit or deter a "substantial amount" of protected speech, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, ___, 122 S. Ct. 1389, 1404 (2002), yet which at the same time respect society's legitimate interest in prohibiting unprotected speech. See *Waters v. Churchill*, 511 U.S. 661, 670-71 (1994); *Burson v. Freeman*, 504 U.S. 191, 206-211 (1992); *Milkovich*, 497 U.S. at 22; *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (noting that the First Amendment calls for rules that "protect[] against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights"). The proper application of these principles to a particular question thus depends on the effect each of the alternatives would have on protected speech rights *and* on the government's ability to accomplish its legitimate objectives. For each possible rule, this necessarily entails an evaluation of the *likelihood* that protected speech will be prohibited or deterred and the potential *severity* of that invasion of free speech rights, taking into account the nature of the speech likely to be affected. *Denver Area Educ.*

Telecomm. Consortium v. Federal Communications Comm'n, 518 U.S. 727, 752 (1996); *Waters*, 511 U.S. at 670-71; *Burson*, 504 U.S. at 198-211; *New York v. Ferber*, 458 U.S. 747, 769-72 (1982); *Miller v. California*, 413 U.S. 15, 23-27 and n.5 (1973); see generally F. Schauer, *Unravelling the Chilling Effect*, 58 B.U. L. Rev. at 694-705.

When the government or another party seeks to subject speech to adverse legal consequences on the ground that it is unprotected, the law relies on two principal means to minimize the risk of erroneous determinations and, thereby, to ensure the greatest possible accommodation between competing free speech and governmental interests: *first*, substantive rules defining the category of unprotected speech that are as definite as the subject matter allows; and *second*, procedures designed to safeguard against the incorrect application of those rules to particular controversies. As the following discussion explains, both of these are more than adequately provided by the substantive and procedural rules governing Illinois' fraud claim against Respondents. Respondents demand still more, however, insisting that even *unprotected* speech consisting of fraud accomplished by half-truths or other implied misrepresentations must be exempt from any liability. That argument is unconvincing.

B. The Procedures Attendant to Illinois' Fraud Action Against Respondents Satisfy the First Amendment.

The Court's precedents establish that the procedure normally required for determining whether particular speech is unprotected is a trial conducted *after* the speech occurs in which the party challenging the speech bears the burden of proof, and at which the relevant facts are determined by a judge or jury in accordance with the established definition of unprotected speech (or protected speech), subject to independent judicial review. See, *e.g.*, *Ferber*, 458 U.S. at 767-78, 773-74; *CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994)

(Blackmun, J., Circuit Justice); see also *Florida Star v. B.J.F.*, 491 U.S. 524, 539 (1989); *Broadrick v. Oklahoma*, 413 U.S. 601, 615-616 (1973); *Miller*, 413 U.S. at 23-27 and n.5; H. Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518 (1977); L. Tribe, *American Constitutional Law* § 12-37 at 1054-55 and n.1 (2d ed. 1988). There is no question that all of these procedural protections were included in Illinois' fraud action against Respondents.[22] The only issue here, then, concerns the constitutional validity of the relevant substantive law to be applied.

C. The Well-Established Legal Definition of a "Misrepresentation" Provides Fair Notice of What Conduct is Proscribed.

Vagueness concerns do not justify barring *any* power by the State to impose liability for charitable solicitation fraud based on implied misrepresentations of verifiably false fact. The limits of constitutionally protected speech or conduct are seldom susceptible to mathematically precise definitions. See *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) ("we can never expect mathematical certainty from our language"); *Arnett v. Kennedy*, 416 U.S. 134, 161-64 (1974); *Miller v. California*, 413 U.S. at 25 n.7. Accordingly, when speech may be prohibited, the First Amendment requires only that the substantive rule of law applied, whether prescribed by statute or common law or supplied directly by

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[22] Although Illinois' complaint contained a prayer for both preliminary and permanent injunctive relief, J.A. 12-13, Illinois never moved for a preliminary injunction, and the lower courts' rulings did not decide what limits the constitution may impose on the *remedies* available against a person who commits fraud while soliciting charitable donations, but instead held that the First Amendment barred *any* recovery against Respondents. Questions relating to the remedies available if Illinois' action may proceed therefore are not appropriately presented for consideration here.

the constitution, must provide "fair notice" as to what is proscribed. See *Grayned*, 408 U.S. at 108-11 and n.15 (citation omitted); see also *City of Chicago v. Morales*, 527 U.S. 41, 56-60 (1999) (plurality opinion); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-49 (1991); *Arnett*, 416 U.S. at 161-64.

Such notice is adequately provided by the well-established definition of a "misrepresentation" in the law of fraud, which has been given a particularized meaning over the course of decades of judicial rulings. The Court has frequently emphasized that vagueness concerns in the First Amendment context are alleviated where a law has received an authoritative judicial construction. See, *e.g.*, *Osborne v. Ohio*, 495 U.S. 103, 115-16 and n.12 (1990); *Ferber*, 458 U.S. at 764. That is unquestionably the case with respect to the legal definition of a fraudulent misrepresentation. See, *e.g.*, *Neder*, 527 U.S. at 22 (noting that already "in 1872 . . . actionable 'fraud' had a well-settled meaning at common law"). Indeed, the definition of what constitutes a misrepresentation is one of the most exhaustively addressed issues in the law. (See above at 15-21.)[23]

It is significant, too, that the long-established definition of a misrepresentation, elaborated and refined by years of jurisprudence, strikes a finely wrought balance between the

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[23] There is no merit to the suggestion that permitting fraud liability to be based on *implied* misrepresentations will invite the arbitrary prosecution of charities whenever the Attorney General believes their fund-raising expenses are "unreasonable." What is important under the law of fraud, and what Illinois alleged here, is not what the Attorney General *believes* in the abstract, but what the victims *specifically understood* based on what Respondents *actually told them*. And where, as here, the alleged misrepresentation relates to how donations will be spent, not some ideological view or issue of general public concern, "there is no realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 505 U.S. at 390.

rights and interests of both "speakers" and "listeners." This definition therefore already carefully accommodates the competing concerns of unrestricted speech and protecting society against deceit for pecuniary gain. That definition should not lightly be set aside on "vagueness" grounds in favor of an essentially untested and undeveloped alternative. And neither the record in this case nor common experience supports the conclusion that the current application of this long-established body of law presents a serious threat to protected speech rights in the area of charitable solicitations.

The Court's decision in *Riley* does not warrant a different conclusion. In that case the Court invalidated a statute under which a fundraising fee above 35 percent of the gross revenues raised for charity was "presumed unreasonable," but the fundraiser could "rebut" the presumption by showing that the fee was necessary due to enable the charity to raise money or to disseminate information or advocacy to the public. *Riley*, 487 U.S. at 785. Even when this presumption was rebutted by showing that the solicitation involved the advocacy or dissemination of information, the factfinder still had to decide whether the fee was "reasonable." *Id.* at 786. The Court held that, in addition to impermissibly imposing on the fundraiser the legal burden of proving the lawfulness of its speech, *id.* at 793, the statute failed to provide any meaningful guidance as to what would be considered "reasonable." *Id.* at 793-94. In response to the State's arguments that "standards for determining '[r]easonable fundraising fees will be judicially defined over the years,'" the Court stated that the *presently* unsettled state of the law would present fundraisers with intolerable uncertainty regarding the lawfulness of their conduct. *Id.* at 794.

The factors leading to that conclusion in *Riley* are absent in the present case. Illinois' claim is not based on some nebulous test of "reasonableness" lacking any equivalent in other established bodies of law; it is based on the concept of

a "misrepresentation," which is widely used throughout law. In addition, as noted above, the common law definition of what constitutes a misrepresentation is not undeveloped by the courts, but on the contrary is one of the most thoroughly examined questions in the law. The Court should therefore reject Respondents' contention that limiting liability for charitable solicitation fraud to *explicit* misrepresentations is the only way to avoid prohibiting a substantial amount of protected speech.

D. Deceptive Charitable Solicitations Do Not Merit "Strategic Protection" Under the First Amendment.

Unprotected speech in the form of fraudulent charitable solicitations based on deceptive half-truths or other implied misrepresentations is not entitled to First Amendment immunity as a matter of "strategic" constitutional protection. When the substantive definition of unprotected speech provides fair notice and the procedural requirements for adjudicating the speech's status are consistent with First Amendment standards, only in very limited circumstances do free speech concerns require an additional *substantive* accommodation for free speech interests under which liability is excluded for admittedly *unprotected* speech. As a general matter, "[o]nce specific expressional acts are properly determined to be unprotected by the first amendment, there can be no objection to their subsequent suppression or prosecution." L. Tribe, *American Constitutional Law* § 12-37 at 1054-55. In occasional, specific situations, the First Amendment requires that even unprotected expression receive "strategic protection" from liability in order to ensure adequate security for protected speech. *Gertz*, 418 U.S. at 342. Such protection is not warranted, however, for fraudulent charitable solicitations practiced by means of half-truths or similarly implied misrepresentations of untrue facts.

The situations in which the Court has ruled that even unprotected speech must be insulated from legal liability present unique factors not present here. Each of those situations involves speech about elections, government officials and operations, or similar matters of substantial public concern. See, *e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (requiring a public official bringing a defamation claim against a media defendant to prove that the defendant knew the statement was false or entertained substantial doubts as to its truth); *Gertz*, 418 U.S. at 339-48 (requiring a private defamation plaintiff suing a media defendant about a matter of public concern to prove at least negligence by the defendant regarding the falsity of the statement); *Brown v. Hartlage*, 456 U.S. 45 (1982) (precluding liability without fault for electoral candidate's campaign promise that could not legally be fulfilled). The Court has recognized that speech of this variety lies at "the heart of the First Amendment," *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988), where its "protection is 'at its zenith.'" *R.A.V.*, 505 U.S. at 429 (quoting *Meyer v. Grant*, 486 U.S. 414, 425 (1988)) (internal brackets omitted); see also *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346-47 (1995). The relevant interests are entirely different, however, where the claim in question asserts that the defendant made a misrepresentation of fact for the purpose of obtaining someone else's money.

In suits like the present one, therefore, liability may validly be determined by applying the well-established legal definition of a "misrepresentation." The First Amendment does not require this definition to be narrowed with a "buffer zone" that would place beyond the States' police power all charitable solicitation fraud that does not resort to outright lies. The considerations that require such "breathing room" elsewhere do not even remotely justify the drastic displacement of long-established fraud principles that Respondents advocate here. (See Brf. in Op. 7.)

E. The Court's Defamation Law Precedents Militate Against Establishing First Amendment Immunity for Implied Misrepresentations by Charitable Solicitors.

The Court's First Amendment jurisprudence in the area of defamation law is particularly relevant to the issue presented here and well illustrates why the Constitution does not require total immunity for implied misrepresentations of fact made for the purpose of obtaining money in the name of charity. The Court has held that, where an alleged defamatory statement involves a public figure or matter of public concern, the Constitution excludes the imposition of liability unless the defendant's *belief* as to whether the statement is true reflects some degree of fault. *New York Times v. Sullivan*, 376 U.S. at 279-80; *Gertz*, 418 U.S. at 339-48. The Court has taken an entirely different approach, however, with respect to whether the allegedly defamatory *statement* is false. That question requires a comparison of the actual facts with the *meaning* of the defendant's statement—which is essentially the same inquiry as the one made in a fraud action to determine whether the defendant's words or actions constitute a "misrepresentation." On that issue, the Court has repeatedly recognized that the constitution does not categorically exclude liability for statements that reasonably imply a verifiably false statement of fact.

In *Milkovich*, 497 U.S. 1 (1990), the Court rejected the notion that the First Amendment categorically precludes defamation liability in favor of a public figure "for anything that might be labeled 'opinion.'" 497 U.S. at 18. Pointing out that "expressions of 'opinion' may often imply an assertion of objective fact," *id.*, the Court held that, if the requisite degree of fault concerning the falsity of the statement is established, liability may arise from a statement which, even if it is expressed as an opinion, "*reasonably implies* false and defamatory facts." *Id.* at 20-21 (emphasis added); see also *id.*

at 20 n. 7 (the issue of falsity relates to defamatory facts *implied* by a statement) (emphasis added, original emphasis omitted). To sustain such a claim, the Court held, the statement must "contain a provably false connotation." *Id.* at 20. A triable claim is presented, however, if these requirements are met and a "reasonable factfinder could conclude that the statements . . . imply" an assertion that is "sufficiently factual to be susceptible of being proved true or false." *Id.* at 21.

The Court's subsequent decision in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), reaffirmed that even defamation claims by public figures against media defendants are permissible where the defendants' statements "might reasonably be construed to state or imply factual assertions that are both false and defamatory." 501 U.S. at 518. Significantly, the Court rejected a view under which the constitution foreclosed liability as long as there was a "rational interpretation" of the statement that was true. *Id.* The Court's decisions in *Milkovich* and *Masson* thus recognize that the First Amendment does not shelter from liability statements that, viewed in the context of the circumstances in which they were made, convey a meaning by implication rather than by express affirmation.[24]

The distinction recognized in these cases between what a statement *means* and whether that meaning is *true* reflects the practical difference between the speaker's ability to

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[24] This approach is also followed where the "literal" meaning of a statement, which would be defamatory, is disregarded because it is not one reasonably attributable to it in the context in which it is made. Thus, for example, such statements do not trigger liability where they amount to mere "rhetorical hyperbole," *Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6, 14 (1970), or were made in jest. *Sack on Defamation* § 2.4.1; 1 R. Smolla, *Law of Defamation* § 6:90 (2d ed. 2001).

control the *meaning* reasonably attributable to his statements, and his ability to ensure that this meaning is factually *accurate*. Thus, when a journalist publishes a statement about a public figure or a matter of public concern, there are practical limits to his ability to be absolutely sure of the accuracy of the facts he reports, especially given the need to report on events while they are still newsworthy. The "actual malice" standard announced in *New York Times Co. v. Sullivan* specifically protects against this risk. By contrast, a person has a greater ability to control the meaning of what he says, and the First Amendment correspondingly does not erect immunity for statements that may reasonably be understood to imply a verifiably untrue fact, as that would merely protect assertions that actually damage another's reputation but do so by means of clever innuendo and artful insinuation. *Masson*, 501 U.S. at 516-18; *Milkovich*, 497 U.S. at 18-21.

The Court's refusal to construct a constitutional barrier to defamation liability for "implicitly" false statements of fact is particularly significant because, when the plaintiff is a public figure, he frequently has the ability to disseminate corrective information that would dispel any false impression created by the defendant's statement. See *Gertz*, 418 U.S. at 344. Even that protection for the listener is lacking in the case of fraudulent charitable solicitations, however. Such solicitations commonly involve one-on-one requests, either over the telephone or in person, for an immediate donation or pledge of funds. Unlike the circumstances surrounding a publicly broadcast defamatory statement about a public figure, that setting for charitable solicitations both increases the opportunity for deceptive abuses and reduces the likelihood that donors will receive any corrective information before deciding whether to make a gift. Cf. *Virginia Pharmacy Bd.*, 425 U.S. at 771 n.24. If statements that reasonably imply a verifiably false statement of fact are not exempt from defamation liability where they are published by the media

about a public figure, they certainly do not deserve that protection when made by a fundraiser who is attempting to get money from someone in a one-on-one conversation.[25]

F. Application of the Traditional Definition of a Fraudulent Misrepresentation Will Not Deter a Substantial Amount of Legitimate Charitable Solicitations.

There is no basis to conclude that application of the well-established definition of a fraudulent misrepresentation to charitable solicitations will deter a substantial amount of legitimate speech by charities or by others on their behalf. When a charitable fundraiser makes representations about how a charity uses contributions, he presumably has complete access to the relevant facts, enabling him to avoid any misleading or deceptive statements. See *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 504 n.22 (1984); *Central Hudson Gas & Elec. Corp. v. Public*

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[25] By contrast, an analogy to the realm of electoral speech is inapposite. Although several lower court cases have held that greater tolerance for misleading statements of fact is required where campaign speech is involved, see, *e.g.*, *Weaver v. Bonner*, 309 F.3d 1312, 1319-20 (11th Cir. 2002); *Briggs v. Ohio Elections Comm'n*, 61 F.3d 487, 494 (6th Cir. 1995); but see *Smith v. Cherry*, 489 F.2d 1098 (7th Cir. 1973) (*per curiam*); *Tomei v. Finley*, 512 F. Supp 695, 698 (N.D. Ill. 1981), similar indulgence in the context of charitable solicitations is misplaced for several reasons. The public has historically entertained a high degree of skepticism about campaign speech and similar political debates; opposing candidates or partisans typically have the opportunity to correct any misleading impression before the public makes a decision based on the information, see L. Tribe, *American Constitutional Law* § 13-26 at 1132; cf. *Gertz*, 418 U.S. at 344; and the speaker is not trying to get someone to part with his money. Those considerations are absent where a private solicitation for an immediate charitable donation or pledge of money is involved.

Service Comm'n of New York, 447 U.S. 557, 564 n.6 (1980); *Virginia Pharmacy Bd.*, 425 U.S. at 771 n.24. The donor, by contrast, has both less knowledge and less access to information necessary to correct any inaccurate or misleading statements by the fundraiser. In these circumstances, the law cannot look solely to the interests of the "speaker," but must also take into account the interest of the "listener" in accurate, non-misleading information. See *Central Hudson* , 447 U.S. at 563; see also *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984) ("False statements of fact harm . . . the readers of the statement."). This is especially true where the solicitation occurs in a one-on-one interaction in which the speaker has an immediate financial stake in the outcome of the communication and requests the donor to make an immediate decision to give money.[26]

In any event, the potential impact of any such chilling effect would seem to be minimal, at best. The chilling effect

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[26] It is open to question whether chilling analysis even applies to claims that a charitable solicitor fraudulently misrepresented how donations would be used. In *Schaumburg* the Court held that charitable solicitations should not be treated as merely commercial speech because they often combine a simple request for money with political advocacy or the dissemination of educational information. 444 U.S. at 632. That general assumption is perfectly appropriate for a facial challenge to a sweeping statute regulating broad categories of charitable fundraising activity without regard to its content. It has less strength, however, in an individual fraud action where the alleged misrepresentation made for the purpose of inducing another person to give the defendant money involves *how* that money will be spent, not *why* it will be spent (*i.e.*, is not speech embodying public advocacy or education regarding matters of general public concern). Cf. *Calder v. Jones*, 465 U.S. 783, 790-91 (1984) (rejecting as "double counting" an argument for additional First Amendment analysis as part of personal jurisdiction inquiry); *United States v. Freeman*, 761 F.2d 549, 551-52 (9th Cir. 1985) (Kennedy, J.).

or *protected* speech resulting from a law that specifically targets *unprotected* speech typically operates on the "margins" of prohibited speech. See *Arnett*, 416 U.S. at 163; *Miller*, 413 U.S. at 28 n.10; *United States v. Harriss*, 347 U.S. 612, 626 (1954); *Speiser*, 357 U.S. at 525; F. Schauer, *Unravelling the Chilling Effect*, 58 B.U. L. Rev. at 696. It is the value of *that* speech which must be considered when evaluating whether the law excessively invades free speech rights. See *Ferber*, 458 U.S. at 762-63 (plurality opinion); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion); see generally F. Schauer, *Unravelling the Chilling Effect*, 58 B.U. L. Rev. at 691-92. Chilling concerns are accordingly reduced in cases like the present one, since any protected speech by charitable solicitors that might be deterred by leaving intact the traditional definition of a misrepresentation is speech bordering on actual fraud regarding how solicited donations will be used.

G. Any Advocacy or Dissemination of Educational Information by Respondents Does Not Immunize Them from Fraud Liability for Misrepresenting How Donations Will Be Used.

That Respondents or VietNow may also have engaged in some advocacy or the dissemination of educational information on behalf of veterans' interests does not defeat Illinois' right to complain that Respondents' *actual* statements to donors concerning the specific ways their contributions would be used constituted fraudulent misrepresentations. The basis for the State's claim is not that any educational information distributed by Respondents was inaccurate; it was that what they specifically told donors about how their contributions would be used was fraudulent. The existence of any such educational information (the nature and quantity of which is not established by the record, but appears to be exceedingly modest, see above at 24, n.21) therefore cannot operate to insulate Respondents from liability for misrepresentations to

donors that have nothing to do with such educational or polemical objectives. Cf. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 68 (1983) ("Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues.")[27] Illinois' claim thus bears no resemblance to the regulations invalidated in *Schaumburg*, *Munson* and *Riley*, which limited *all* speech, regardless of its content, based solely on the percentage of revenues devoted to fundraising.[28] The trial of *this* case will not implicate the value of helping veterans. (See also below at 39-40.)

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[27] In a similar context, the court observed in *United States v. Hildebrand*, 152 F.3d 756 (8th Cir. 1998):

> These defendants . . . argue that . . . their actions were motivated by a political objective, namely, to overhaul the monetary system. However, they were charged with mail fraud and money laundering, not anti-government speech. Their speech was challenged only to the extent that they fraudulently solicited claims.

152 F.3d at 765; see also *United States v. Freeman*, 761 F.2d at 552; Cf. *Miller v. California*, 413 U.S. at 25 n.7. None of the donors who submitted the affidavits attached to the complaint said they were told their money was going to be used to pay for public education or advocacy efforts. J.A. 107-194. Such expression by Respondents, to the extent is existed, therefore raises no free speech implications in this case.

[28] Illinois acknowledges the Court's observation in *Schaumburg* that charitable solicitations are entitled to heightened scrutiny for the additional reason that they provide the necessary resources for education and advocacy. *Schaumburg*, 444 U.S. at 632. This of course does not mean that the First Amendment protects *unlawful* means to obtain such resources or validates the diversion of contributions specifically solicited and given for the relief of human suffering to general public education or advocacy.

H. Precluding Liability for Charitable Solicitation Fraud Accomplished with Deceptive Half-Truths and Similar Implied Misrepresentations Would Critically Impair the States' Substantial Interest in Preventing Actual Fraud.

An additional reason why the First Amendment does not require insulating fundraisers from fraud liability unless they resort to blatant lies is that such a restriction would dramatically impair the States' ability to prevent actual fraud on the public. If implied fraud is constitutionally blessed, the available opportunities for exploitation of the public's desire to aid those in need and to support worthy causes will inevitably multiply. Given the complexity of language and human interaction, the permissible means to commit actual fraud without affirmatively stating literal falsehoods will be virtually limitless, and ingenious swindlers will face no effective restraint on their schemes.[29] The only real brake on such abuses—mounting public cynicism about *all* charities—will then hurt *bona fide* charities as much as unscrupulous individuals claiming to act for charitable purposes.[30]

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[29] The consequences of such a regulatory vacuum for charitable solicitations is graphically illustrated by Respondents' contention below that they would be immune from liability even if they kept 99 percent of all donations they solicited. (See above at 16.)

[30] This Court has long recognized the inherent sovereign authority of States to supervise the administration of assets given for charitable purposes. *Vidal v. Girard's Executors*, 43 U.S. (2 How.) 127, 188-97 (1844) (Story, J.). That authority, exercised in Illinois by the Illinois Attorney General under common law and statute, includes ensuring the proper application of assets given for specified charitable uses and thereby protecting the interest of the people of the State in receiving the benefit intended for them. See 760 Ill. Comp. Stat. 55/12 (2000); *In re Estate of Laas*, 171 Ill. App. 3d 916, 920-21, 525 N.E.2d 1089, 1092-93 (1988); *People ex rel. Scott v.*

(continued...)

The First Amendment should not codify a falsely appealing philosophy that ignores how people actually respond to charitable appeals. An unrealistically harsh principle of "caveat donor" would merely create a self-fulfilling prophesy of donor cynicism. As the Court has observed: "People have a right to assume that fraudulent advertising traps will not be laid to ensnare them. 'Laws are made to protect the trusting as well as the suspicious.'" *Donaldson*, 333 U.S. at 189 (quoting *Federal Trade Comm'n v. Standard Educ. Society*, 302 U.S. 112, 116 (1937)). That same observation is just as valid, if not more so, when it comes to appeals for charitable gifts. See Note, *Developments in the Law, Nonprofit Corporations*, 105 Harv. L. Rev. 1578, 1635 (1992) ("Donor ire is aroused time and again by media exposés of solicitation campaigns in which a charity has received only five cents on the dollar"). The free speech clause should not be transformed into a license for unscrupulous fundraisers to defraud the public in the name of raising money for charity.

III. Illinois' Claim Against Respondents Does Not Impermissibly Rely on the Amount of Their Professional Fee to Establish Fraud.

Respondents argued below, and the Illinois Supreme Court agreed, that the State's claim against Respondents relies on their fee in several ways forbidden by the First Amendment. These contentions are neither persuasive nor supported by this Court's precedents.

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[30] (...continued)
George F. Harding Museum, 58 Ill. App. 3d 408, 413, 374 N.E.2d 756, 760 (1978). There is not an unlimited supply of charitable donations, and these responsibilities of the Illinois Attorney General on behalf of the State's citizens are appropriately furthered by the type of action brought here, which both directly and indirectly promotes the integrity of charitable assets and public trust in philanthropic organizations.

A. Illinois' Fraud Action Does Not Regulate the "Reasonableness" of Respondents' Fee.

It is important to clarify as an initial matter that Illinois is pursuing a claim of *actual fraud* against Respondents, not attempting to regulate the "reasonableness" of their fee. In *Schaumburg*, *Munson* and *Riley*, the Court sustained facial challenges to statutes under which charitable fundraising expenses above a certain percentage (which in those cases ranged from 25 percent to 35 percent) were declared *per se* unlawful or shifted to the fundraiser the burden of proving that its fee was "reasonable." Two principal justifications were offered in defense of those statutes: maximizing the amount of money actually devoted to charitable activities, and protecting the public from fraud. See *Riley*, 487 U.S. at 789-90, 792; *Munson*, 467 U.S. at 966 n.4. Addressing the first justification, *Munson* declared that "[t]he percentage limitation is too imprecise a tool to achieve that purpose." 467 U.S. at 966 n.14. The Court in *Riley* reaffirmed this holding and went even further, rejecting as constitutionally unsound the "paternalistic premise" that government, not charities themselves, knows best what charities should say and how they should say it. 487 U.S. at 790-91. These holdings, which Illinois does not challenge here, have no bearing on its claim of actual fraud against Respondents. What *is* relevant in those opinions is the Court's repeated affirmation that States need not "sit idly by and allow their citizens to be defrauded," but instead are fully entitled to "vigorously enforce [their] antifraud laws." *Id.* at 800. That is precisely what Illinois is doing in this case.

The common feature of the laws struck down in *Schaumburg*, *Munson* and *Riley* is that they declared charitable solicitations unlawful based solely on how donations were *spent*, regardless of what donors were *told*. Thus, if the statutory fundraising limits were exceeded, those statutes prohibited charitable solicitations even by fundraisers who

fully and accurately disclosed exactly how donations would be used. This, as the Court noted, did not correspond closely with the asserted purpose of targeting actual fraud.

Illinois' present action, by contrast, focuses on how Respondents *solicited* charitable contributions, and in particular on whether the specific representations they made about how contributions would be used were deceptive. Whether Respondents *actually* committed fraud depends on what the public reasonably understood by Respondents' representations, whether that was true, and whether Respondents intended donors to rely on their representations—not on whether VietNow's decisions about how to *spend* the revenues generated by Respondents' fundraising activity can be characterized as "unreasonable." Such a claim does not constitute an attempt to regulate the reasonableness of Respondents' fee.[31]

B. Respondents' Fundraising Fee is Not Irrelevant to Whether They Committed Fraud.

Having alleged that Respondents' statements to donors about how donations would be spent constituted fraudulent misrepresentations in light of the negligible amount actually used for those purposes, Illinois may naturally support its claim with evidence of the fundraising fees Respondents actually receive under their contracts with VietNow. Respondents suggest that the First Amendment precludes Illinois from using their actual fee in this way, and even makes a

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[31] Because Illinois' objective is to protect the *public* from fraud, not to protect *charities* because they supposedly "are economically unable to negotiate fair or reasonable contracts without governmental assistance," *Riley*, 487 U.S. at 790, it is no answer to Illinois' claim that *VietNow* consented to Respondents' fee. *Respondents' statements to donors* do not cease being misrepresentations simply because, unbeknownst to them, *VietNow* agreed with *Respondents* that their contributions would be used in some other way.

fundraiser's fee categorically irrelevant, as a matter of constitutional law, to whether it commits fraud. This suggestion is unfounded.

The Court's precedents clearly hold that the law cannot declare a fundraiser's fee *alone* to be unlawful. See, *e.g.*, *Munson*, 467 U.S. at 961 (noting *Schaumburg*'s holding that there is no "*necessary* connection" between high fundraising fees and fraud) (emphasis added); *id.* at 966 (reaffirming that high solicitation costs are not an "accurate measure of fraud"); *Riley*, 487 U.S. at 794 n.8 (concluding that fraud cannot be presumed from the "*surrogate* and imprecise formula" of a fundraiser's fee) (emphasis added). These decisions just as clearly do *not* hold, however, that fundraising fees constitute a special constitutional category of facts that are *irrelevant* to whether fraud occurred in a specific case. It is one thing to say that a high fee *by itself* cannot establish fraud, which the Court's precedents support. It is quite another to say that such a fee is *never* relevant to whether actual fraud occurred in a given situation. That proposition finds no support in this Court's decisions.[32]

One of the key issues in dispute in any claim alleging a fraudulent misrepresentation is whether the meaning reasonably conveyed to donors by the defendant's statements materially differs from the truth. If, as in this case, the

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[32] No different conclusion can be drawn from *Riley*'s reference to the "clear holding in *Munson* that there is no *nexus* between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent." 487 U.S. at 793 (emphasis added). Read in context, this shorthand description of *Munson* clearly was not intended to go beyond the Court's actual holdings in *Schaumburg* and *Munson* that a fundraising percentage is not enough, *in and of itself*, to establish fraud, and that the vice of those statutes was that, ostensibly in the name of preventing fraud, they "aimed at something else in the hope that [they] would sweep fraud in during the process." *Munson*, 467 U.S. at 969-70.

representation involves how charitable donations will be used, it is of course relevant to show that they were not actually devoted to those uses because, except to an insignificant degree, they instead went to a professional fundraiser.

Illinois' complaint alleged that Respondents told donors their money would be used for specific charitable purposes, and that these donors, while presumably assuming that *some* of their contributions would go to fundraising or administrative costs, reasonably understood that "*much more*" than 15 percent of their donations would actually be used for those purposes. J.A. 20, 87-88, 104. The State further specifically alleged that Respondents withheld from donors how much of their contributions was actually devoted to these uses for the purpose of inducing them to make a contribution in reliance on the false impression created by what Respondents *did* say. J.A. 86, 104. Illinois is accordingly entitled to support its claim that those representations are false with evidence that only an insubstantial portion of donations was actually used as Respondents represented. A contrary rule would make no sense, for how donations are used is often the most important factor in a person's decision to make a gift. Indeed, Respondents seemingly concede that their fundraising fee would be admissible in a fraud action against them if they affirmatively misstated that fee. (Brf. in Op. 28.) If this is true, however, their fee cannot be categorically *irrelevant* to whether they committed fraud.

C. Illinois' Claim Against Respondents Does Not Rest Upon Any Legal "Presumption" that the Amount of Their Fee Makes Their Solicitations Fraudulent.

Illinois' allegation that Respondents' representations were false because they kept 85 percent of all donations likewise does not rely on any legal "presumption" of fraud, *i.e.*, a rule of law that imposes on Respondents the *burden of disproving* their liability. There is therefore no relevant

comparison with the statutory provision struck down in *Riley* which (although it made the ultimate issue one of "reasonableness," not fraud) imposed on the fundraiser just such a legal burden. As noted above (at 29), under the statutory provision challenged in *Riley*, any charitable fundraising fee above 35 percent was "presumed unreasonable," and therefore illegal, but a fundraiser was allowed to "rebut the presumption" with other evidence. 487 U.S. at 784-86 and n.2. The effect of this provision was that the fundraiser would be found in violation of the law if the *only* evidence were its fee. For First Amendment purposes, the Court held, such a rule of law was no more valid than one declaring such a fee conclusive evidence of fraud. *Id.* at 793; see also *Speiser*, 357 U.S. at 525-26.

No similar legal principle applies here. Illinois is not proceeding under any law that declares solicitation costs above a certain percentage automatically or presumptively unlawful. The State is proceeding under the common law of fraud, as well as its generally applicable anti-fraud statutes, under which the plaintiff has the burden of proving all of the necessary elements. The fact that Respondents kept 85 percent of all donations does not create a legal "presumption" of fraud, but merely constitutes evidence of the truth concealed by misrepresentations that will be proved by other evidence. See generally 31A C.J.S. *Evidence* § 131 c (1996); cf. *Yates v. Evatt*, 500 U.S. 391, 402 n.7 (1991); *Barnes v. United States*, 412 U.S. 837, 841-45 (1973). There is no merit, therefore, to Respondent's contention that Illinois' fraud action unconstitutionally "presumes" that their fundraising fee establishes fraud.

D. Illinois' Claim Against Respondents Does Not, by Relying on the Information They Withheld to Establish They Made Fraudulent Misrepresentations, Constitute Unconstitutionally "Compelled Speech."

Finally, Illinois is not unconstitutionally "compelling" Respondents to disclose their fundraising fee in violation of the First Amendment. Nothing requires Respondents, when soliciting donations on behalf of VietNow, to tell potential donors their contributions will be devoted to specific charitable uses. That may be a natural selling point for any charity, and it can be expected that fundraisers will often wish to emphasize these uses to donors. If they do so, however, the First Amendment provides no refuge for misleading half-truths. Under well-established fraud principles, once a fundraiser chooses to disclose certain facts about the use of donations, it cannot withhold other facts in such a way that the public is given a false impression. (See above at 19-20.) If, as Respondents maintain, the Constitution required a contrary result, the First Amendment would simply become an engine for fraud clothed in the garb of free speech.

The statutory provision held invalid in *Riley* is readily distinguishable from the present situation. Under that provision, all employees of a professional fundraiser (but not of a charity) were required to disclose to potential donors their name, the name and address of their employer, and the average percentage of the fundraiser's gross receipts from in-state operations during the preceding year that was turned over to charities. *Riley*, 487 U.S. at 786. Significantly, this disclosure was mandated *before* the fundraiser requested a donation and *regardless of what else it said*. *Id.* The Court held that this requirement was invalid for two interrelated reasons. First, it represented a form of "compelled speech" contrary to the First Amendment's basic premise that government generally may not control the content of pro-

tected private speech. Second, it did not accomplish by narrowly tailored means the state's goal of providing donors more complete information regarding how contributions would be spent. *Id.* at 796-90.

The State's "prophylactic, imprecise, and unduly burdensome rule . . . adopted to reduce . . . alleged donor misperception," the Court explained, was both *overinclusive* in those situations "where the solicitation is combined with the advocacy and dissemination of information," in which case the charity benefits from the solicitation itself, and *underinclusive* because it excluded charities that directly incurred equally high fundraising costs without using professional fundraisers. *Id.* at 798-800. The means chosen by the State were also less vital to the accomplishment of its objective, the Court added, because for-profit fundraisers were already required to disclose their professional status, "thereby giving notice that at least a portion of the money contributed will be retained," and because "[d]onors are also undoubtedly aware that solicitations incur costs, to which *part* of their donation might apply." *Id.* at 799 (emphasis added).[33] The Court carefully emphasized the limited nature of its ruling, however, stating that "the State may vigorously

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[33] Justice Scalia, dissenting from the Court's statement that professional fundraisers could constitutionally be required to disclose their status, observed (487 U.S. at 803-04, emphasis added):

> Where core First Amendment speech is at issue, the State can assess liability for *specific* instances of deliberate deception, but it cannot impose a prophylactic rule requiring disclosure even where *misleading* statements are not made. Since donors are assuredly aware that a *portion* of their donations may go to solicitation costs and other administrative expenses . . . it is not misleading in the great mass of cases for a professional solicitor to request donations "for" a specific charity without announcing his professional status.

enforce its antifraud laws to prohibit professional fundraisers from obtaining money *on false pretenses* or by making false statements." *Id.* at 800 (emphasis added).

Application of traditional fraud principles to proscribe deceptive half-truths and similar frauds is therefore entirely consistent with the First Amendment. Those principles do not impose the heavy hand of government on what fundraisers may say, and they are not designed to drive away donors *before* charitable solicitors have any opportunity to explain what a charity does or why it deserves support. Instead, by focusing specifically on any representations that are misleading because they constitute a deceptive half-truth, they represent a narrowly tailored means to further the State's interest in preventing actual fraud. In such limited circumstances, the First Amendment does not give fundraisers the constitutional right to withhold the "undisclosed half" (or, in this case, the undisclosed 85 percent) of a half truth. See *United States v. Harriss*, 347 U.S. at 625-26 (upholding disclosure obligations of the Federal Regulation of Lobbying Act because they did not forbid lobbying activities but only required the disclosure of information necessary to guard against the evil of "special interest groups seeking favored treatment while masquerading as proponents of the public weal"); see also *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 ("First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed").

In the present case, it was Respondents' *own* representation that donations would be used to provide food, shelter and other specific types of support for needy veterans that makes the nondisclosure of their 85 percent fee deceptive under traditional fraud principles. Permitting these principles to apply, as they do in all other situations, is not tantamount to unconstitutionally forcing specific speech on Respondents. Cf.

Cohen v. Cowles Media Co., 501 U.S. 663, 671 (1991) ("Minnesota law simply requires those making promises to keep them").[34]

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[34] Concerns about the infringement of free speech rights are also reduced because generally applicable fraud principles, by imposing liability in this manner, condemn *all* deceptive half-truths, not just ones of a particular viewpoint. Cf. *R.A.V.*, 505 U.S. at 385; *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 458 (1997) (holding that challenged agricultural marketing orders did not abridge free speech because, among other things, "they do not compel anyone to endorse or to finance any political or ideological views").

CONCLUSION

The judgment of the Illinois Supreme Court should be reversed.

Respectfully submitted,

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No. 01-1806

IN THE

Supreme Court of the United States

THE PEOPLE OF THE STATE OF ILLINOIS
ex rel. JAMES E. RYAN, ATTORNEY GENERAL
OF THE STATE OF ILLINOIS,
Petitioner,

v.

TELEMARKETING ASSOCIATES, INC.,
RICHARD TROIA and ARMET, INC.,
Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

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QUESTION PRESENTED

May a State prosecute a claim of common law fraud based solely on the failure to disclose the cost of fundraising during a solicitation for a charity when government believes the cost is too high?

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CONSTITUTIONAL PROVISIONS INVOLVED

The First and Fourteenth Amendments to the United States Constitution provide: "Congress shall make no law . . . abridging the freedom of speech . . ." U. S. Const. amend. I. " . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

In 1991, Petitioner, the People of Illinois *ex rel.* Attorney General James Ryan, filed suit against Respondents, Telemarketing Associates, Inc., Richard Troia, and Armet, Inc. The Complaint alleged Respondent Armet was not registered as a professional fundraiser as required by Illinois law governing charitable solicitations. J.A. 7. Petitioner alleged Respondents' fees were "excessive in amount" and, therefore, fraudulent. J.A. 9. Petitioner alleged Respondents, while raising money for VietNow:

> . . . did not advise the donors that the campaign was being conducted pursuant to private for-profit contracts whereunder a negligible amount, or only 15%, of all funds raised would be given to VietNow and used for its charitable purpose.

J. A. 10.

Petitioner did not allege Respondents affirmatively misrepresented any material fact; nor that the other Respondents were not properly registered; nor that the Respondents failed to disclose at the point of solicitation their paid status and that their contract and financial reports were on file with the Petitioner as required by 225 Ill. Comp. Stat. 460/17 (2000); nor that they failed to make any other statutory filing or disclosure requirement.

On June 25, 1996, Petitioner amended the Complaint. Petitioner alleged:

> In soliciting for VietNow, TROIA and TELEMARKETING and their agent solicitors rarely, if ever, disclosed to donors that less than 17 percent of the contributions would be paid over to VietNow, and that more than 83 percent of the contributions would be used for fundraising and other expenses.

J. A. 85.

Respondents moved to dismiss the Complaint on September 6, 1996. On November 4, 1996, Judge Hett dismissed the fraud claim, but denied the Respondents' Motion insofar as it pertained to the failure to register. Judge Hett gave Petitioner leave to amend. Pet. App. 36.

On December 4, 1996, Petitioner amended the Complaint a second time, adding new allegations and noting that the contract between VietNow and Respondents had been renewed. Again, Petitioner did not allege affirmative misrepresentation by Respondents, but, rather, alleged the cost of fundraising was "excessive." *See, e.g.*, J.A.103. Judge Hett again dismissed Petitioner's fraud allegations. Pet. App. 33.

Petitioner dismissed its remaining claim that the Respondent Armet had failed to register as required by law pursuant to an Agreed Judgment Order on December 1, 1998, thus ending the first stage of this litigation. Pet. App. 30. Petitioner filed its Notice of Appeal on December 24, 1998.

On May 19, 2000, the Appellate Court of Illinois, First District, Sixth Division, held *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988)("*Riley*"); *Sec'y of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984)("*Munson*"); and *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980) ("*Schaumburg*"), mandated dismissal of the Complaint. Pet. App. 19.

Petitioner appealed to the Illinois Supreme Court which affirmed the Appellate Court's ruling. In its November 21, 2001, opinion, written by Justice Mary Ann McMorrow, the Illinois Supreme Court, in reliance in *Riley* and its predecessors, ruled that the First Amendment protects VietNow's telephone solicitations as fully protected speech because "solicitation is characteristically intertwined with informative and perhaps persuasive speech." 198 Ill. 2d 345, 729 N.E. 2d 289, 294 (2001) ("*Ryan*").

The Court noted that the 85% of donations received retained by Respondents was not solely the "fee" for making the solicitations. Rather, this percentage paid for expenses to create and maintain a statewide appeal, produce more than 2,000 copies of a magazine aimed at raising awareness about VietNow and its cause, and maintain a toll-free number providing information about the charity. *Id.* at 297.

Justice McMorrow observed that beyond these tangible services, "charities often reap non-monetary benefits by having their message disbursed by the solicitation process. In fact . . . the solicitation may be so intertwined with informative and persuasive speech that the solicitation itself is part of the charitable purpose." *Id.* at 298. Compelled disclosure of Respondents' compensation is tantamount to silencing VietNow's appeal. Respondents would be hard-pressed to keep prospective donors on the phone after disclosing how the funds were distributed. The Court wrote, "'. . . the disclosure will be the last words spoken as the donor hangs up the phone.'" *Id.* at 299. The Court concluded that ruling in favor of Petitioner would chill the activities of all fundraisers: "[They] would be at a constant risk of incurring litigation costs, as well as civil and criminal penalties, which could produce a substantial chilling effect on protected speech." *Id.* The Court also noted that "there is no allegation that [Respondents] made affirmative misstatements to potential

donors." *Id.* at 291. Petitioner applied for a writ of *certiorari* from this Court which was granted on November 4, 2002.

SUMMARY OF ARGUMENT

The First Amendment protects the rights of a charity to solicit support. A charity soliciting by telephone only has a few seconds to deliver its chosen message. Government should not be allowed to interrupt and alter fully-protected speech by directly or indirectly compelling disclosures of fundraising costs. Petitioner's suit to compel such disclosures violates the Constitution.

Professional fundraisers which solicit support from the public on behalf of charities are heavily regulated by Illinois. The Solicitation for Charity Act, 225 Ill. Comp. Stat. 460 *et seq.* (2000), (the "Act") imposes a litany of requirements on professional fundraisers. The Illinois General Assembly designed the Act to prevent fraud without infringing on protected speech.

Professional fundraisers must register, pay a fee and post a $10,000 bond. Professional fundraisers must file financial reports. The Act bars convicted felons from registration as professional fundraisers. The Act bars any person convicted of a misdemeanor involving fiscal wrongdoing, breach of fiduciary duty, or violation of the Act, from registration as a professional fundraiser for a period of five years from the date of conviction. 225 Ill. Comp. Stat. 460/6 (2000).

The Act regulates contracts between professional fundraisers and charities. The contract must contain an estimated, reasonable budget disclosing both the targeted amount of funds to be raised, as well as the projected expenses which must delineate all projected costs. The contract must grant the charity the right to approve in advance the content and form of all solicitation materials. A professional fundraiser who materially fails to comply with these provisions may not collect or retain any compensation or fee. 225 Ill. Comp. Stat. 460/7 (2000).

Individual solicitors working for professional fundraising businesses also must register. No individual convicted of a felony may register as a professional solicitor. No individual convicted of a misdemeanor involving fiscal wrongdoing, breach of duty or violation of the Act may act as a solicitor. 225 Ill. Comp. Stat. 460/8 (2000).

The Act requires fundraisers to make disclosures during verbal or written solicitations. Professional fundraisers must promptly inform consumers by a statement in an oral communication and a clear and unambiguous disclosure in a written appeal that ". . . the solicitation is being made by a paid professional fundraiser. The fundraiser, solicitor, and materials used shall also provide the professional fundraiser's name and a statement that contracts and reports regarding the charity are on file with the Illinois Attorney General. . ." Upon request by a prospective donor, a professional fundraiser must disclose its fee and the net amount or the percentage of each contribution to be received by the charitable organization. 225 Ill. Comp. Stat. 460/17 (2000).

The Act prohibits misrepresentations in solicitations. It specifically defines what constitutes a "misrepresentation." Prohibited misrepresentations include failure to disclose professional status and making materially false statements regarding the purpose for which the contribution will be used. Failure to provide a truthful answer to a request as to the estimated percentage or actual percentage, if known, of the amount the charity will receive and the amount the professional fund will receive is also a misrepresentation. The Act provides it is a misrepresentation for the fundraiser to falsely represent itself to be a member of the charity or a volunteer. Additionally, any person soliciting for a charity who makes an intentional misrepresentation is subject to punitive damages. 225 Ill. Comp. Stat. 460/18 (2000).

The Act requires Petitioner to use the fees and penalties collected through the Act to provide the public with information and for enforcement. 225 Ill. Comp. Stat. 460/22 (2000).

Petitioner alleges only one substantive violation of the Act, i.e., that the Respondent Armet failed to register pursuant to 225 Ill. Comp. Stat. 460/6, J.A. 8. Petitioner withdrew this claim. Petitioner made no other allegations of violations of the Act. The remaining allegations in the Complaint are that Respondents' compensation is excessive and Respondents' failure to "advise" potential donors of the nature and extent of such compensation constitutes fraud.

The solicitation of support by or on behalf of a charity is a form of fully protected speech. *Riley*, 487 U.S. at 789; *Munson*, 447 U.S. at 967; *Schaumburg*, 444 U.S. at 632. Petitioner alleges Respondents committed fraud by failing to "advise" each donor during each appeal as to the percentage of each dollar which would be spent on fundraising costs. J.A. 10. Thus, Petitioner attempts to do indirectly that which this Court has ruled may not be done directly. *Riley, supra.* The Constitution is not so easily evaded.

Petitioner's averment of fraud is based on the premise that the percentage of donations spent on fundraising is material to whether a solicitation is fraudulent. This Court has rejected this premise. ". . . [T]here is no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent . . ." *Riley*, 487 U.S. at 792, citing *Munson*, 467 U.S. at 950; *Schaumburg*, 444 U.S. at 637. Respondents readily acknowledge that fraudulent words are not protected by the First Amendment. This Court has made clear, however, that Petitioner may not define "fraud" solely based on the cost of fundraising.

Petitioner's approach creates even graver concerns than the government actions reviewed by this Court in *Riley*, *Munson*, and *Schaumburg*. No standard limits Petitioner's discretion (and other prosecutors). Charities have no way of knowing

when costs are "excessive," thus triggering the duty to disclose such costs to potential donors on pain of being sued for fraud. Respondents, further, had no fair warning that Petitioner would compel this speech. Unless a charity is willing to risk prosecution, and few would, a charity would be required to make the disclosure of fundraising cost. Whether the Petitioner would require the percentage for each campaign, or a charity's overall record, is unclear. Neither figure accurately measures the worth of the solicitation to the charity.

Petitioner contends that the payment of 15% of funds raised to VietNow is a "trifling amount," but provides no opinion as to what percentage is "reasonable".[1] This decision is left to the unguided discretion of any prosecutor. It is entirely feasible that the prosecutor in Springfield may disagree with the prosecutor in Peoria regarding the demarcation between "reasonable" and "excessive." A charity's only recourse from this "patchwork quilt" of prosecutions would be to abstain from soliciting support. Charities need uniform,

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[1] Apparently, however, 17% is not a "trifling amount." Petitioner declined to bring a fraud action when asked about a charity ball held by the Governor of Illinois in 2001 even though 17% of the money raised went to charities. *Governor's Charity Ball Gave Just 17 Pct. of Funds to Needy*, St. Louis Post-Dispatch, Sept. 11, 2001, at B3. Petitioner saw no reason to investigate, though it seems highly unlikely that attendees were informed that only 17% of the proceeds would go to charitable uses. ("The amount of money we're talking about that was spent on overhead expenses and vendors . . . given the nature of the event, doesn't suggest they've run afoul of the law, which would prompt this office to do something."). *Id.* On the other hand, Floyd Perkins, counsel on behalf of the Petitioner admitted to the Circuit Court: "In a situation, 100 percent [fundraising cost] might be appropriate." Portions of the transcript from oral hearings are attached hereto as the Respondent's Appendix for the Court's convenience. These materials are a part of the trial record. ("App."). App. 6a.

consistent, and specific advance notice of what is prohibited, or they may remain silent to avoid prosecution.[2]

It is no answer to the lack of a standard that charities may contest fraud prosecutions and have their day in court to rebut allegations of "fraud." *See, e.g., Riley*, 487 U.S. at 793-794. The right to contest a charge is neither a substitute for the fair warning required by the First and Fourteenth Amendments nor does it alleviate the "chill" caused by fear of prosecution and the expense of litigation.

Petitioner ignores the fact that charities may reap important non-monetary benefits from solicitations even if they have high costs. *Riley*, 487 U.S. at 798. Many factors can affect a charity's success in fundraising including but not limited to: the popularity of its cause, its message, its name recognition, whether the campaign is to past donors or to prospects, labor costs, postage etc. All of these factors affect the cost of that solicitation to the organization, but are unrelated to whether the solicitation is fraudulent.[3] Petitioner disregards the

[2] How could a charity reconcile the potentially inconsistent opinions of fifty states' attorneys general and innumerable other regulators, including, under common law, private individuals? In *Munson*, the Secretary of State of Maryland found that the fundraising costs of thirteen charities (of sixteen applicants) were reasonable even though they exceeded the statutory limit of 25 percent, including five charities with fundraising costs between 80 and 85 percent. *Munson*, 467 U.S. at 967 n.15. A charity's only solution to this dilemma is silence. There is also disagreement in the industry as to what costs actually determine this percentage. One expert noted: "There is no uniform method for measuring fund-raising expenses. Indeed, there is disagreement within the nonprofit field over the definition of fundraising, including when to allocate costs between program and fund-raising activities." Bruce R. Hopkins "A Struggle for Balance," *Advancing Philanthropy*, Fall 1995, 26-31.

[3] For example, a series of calls to a potential donor unaware of the charity will be much more expensive to the organization, based on percentages, than calls to renew prior donors' support, but is no more likely to be fraudulent. Bruce R. Hopkins, *The Law of Fundraising* 90 (3d ed. 2002) ("Hopkins"). Donor acquisition campaigns generally cost a charity more money than they earn. James M. Greenfield, *The Nonprofit Handbook: Fund Raising* 259 (2d ed. 1997). Charities choose to absorb losses because of the nonmonetary benefits of these campaigns.

myriad benefits a charity derives from appeals besides monetary return, *e.g.* heightened name recognition, public education, and advocacy for a cause. *Riley*, 487 U.S. at 798; *Munson*, 467 U.S. at 963; *Schaumburg*, 444 U.S. at 635.

Compelling Respondents to include this information in their solicitations necessarily changes the content of Viet Now's message and, therefore, is content-based. *Riley*, 487 U.S. at 795. As a content-based restriction on fully protected speech, the disclosure is subject to the highest level of scrutiny by this Court. It must be narrowly tailored to further a compelling government purpose by the least restrictive means available. Donor education, disclosure of fees upon request, and prosecution of fraud are less restrictive means with fewer opportunities for standardless regulation which chills free speech. These are already required by Illinois law.

Nor can Petitioner circumvent the will of the Illinois General Assembly by creating a common law requirement not found in—indeed at odds with—the legislation regulating this aspect of charitable fundraising. Petitioner's attempt to compel speech cannot satisfy strict scrutiny, for it is not a "fine tool" with delicate impact on protected speech, but, rather a prophylactic and inaccurate measure of fraud with blunt impact which will silence legitimate speech and deter potential speakers.

For these reasons, this Court should affirm the judgment of the Illinois Supreme Court.

ARGUMENT

Petitioner neither alleges Respondents made affirmative misrepresentations in their solicitation calls nor that Respondents failed to disclose any fact required by the Act.

Petitioner alleges Respondents defrauded the public by failing to "advise" donors during each telephone call that their fees were, in Petitioner's opinion, "excessive in amount," expressed as a percentage of total funds raised for the charity. J.A. 9-10.[4] By prosecuting as "fraud" the failure to affirmatively disclose "excessive fees" during an appeal to a potential donor, Petitioner forces all future speakers to disclose their fundraising costs, regardless of the level of those costs, or risk similar prosecution. In the absence of any standard as to "excessiveness," the only sure way to avoid prosecution for "fraud" is to "volunteer" this disclosure. Petitioner's approach would create in practice precisely the compelled speech requirement rejected by this Court in *Riley*.

I. PETITIONER'S COMPLAINT FOR COMMON LAW FRAUD CREATES AN AFFIRMATIVE DISCLOSURE REQUIREMENT.

Petitioner's suit is based on "excessive" fundraising costs. Petitioner does not argue that fundraising costs which are "reasonable" must be disclosed. All allegations are predicated on the erroneous assumption that high fundraising costs indicate fraud.

A. The Complaint and Amendments are Based on Allegedly Excessive Fees.

Petitioner first filed suit against Respondents alleging violation the Act, common law fraud, and breach of fiduciary duty. J.A. 1. The Complaint alleges that one of Respondents failed to register under the Act (J.A. 7) but does not allege

[4] Petitioner's Pleadings and statements of counsel before the Circuit Court clearly show that the "percentage" is the sole measure it used to determine to file this suit, *e.g.*, "Material misrepresentation conjures up substantial. And when you talk about numbers, I guess you've got to do percentage. I don't know any other way that I could use substantial." App.4a.

that Respondents failed to provide any of the information required to be disclosed by the Act, *e.g.*, to truthfully provide information about their fees if asked by a donor. Petitioner twice amended the Complaint to add claims of fraud under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 501/1 et seq. (1996), and § 2 of the Illinois Uniform Deceptive Trade Practices Act, 815 Ill. Comp. Stat. 510/2 (1996). J.A. 83, 101.

It is clear that the gravamen of the Complaint can be reduced to the allegation that VietNow paid "too much" for Respondents' services. Petitioner cannot disavow this allegation now, and "unring a bell," concerning its paternalistic judgment that VietNow must be regulated for its own benefit with regard to fundraising costs.

1. *Petitioner's Complaint Alleges the Respondents' Fees Were "Excessive in Amount."*

The first of Petitioner's theories in this case is set forth in the Complaint. J.A. 1. The Complaint alleges the fees charged by Respondents were "excessive in amount" such that Respondents committed fraud. *See, e.g.,* Complaint ¶¶ 32, 33, 35 and 38, J.A. 9-10. Petitioner also alleged that failure to disclose that "a negligible amount, or only 15%, of all funds raised would be given to Vietnow and used for its charitable purpose" constituted fraud. Complaint ¶ 34, J.A. 10.

Petitioner now states it makes no judgment as to the fee charged by Respondent. *See* Pet. Brief 41 *et seq*.[5] A leopard cannot so easily change its spots.

[5] Petitioner's arguments for fraud by omission cannot be considered by the Court without reference to Petitioner's ongoing and improper opinion as to VietNow and its contract, e.g. describing the benefit of the contract to VietNow as "exceedingly small" and "a trifling amount." Pet. Brief, 10 and 16.

Petitioner sought the following relief: (a) surcharge Respondents for assets allegedly misspent or misused and for all proceeds, fees, and salaries paid, J.A. 12.; (b) preliminary and permanent injunction against Respondents preventing them "from soliciting or holding funds for charitable purposes within the State of Illinois," J.A. 13; (c) enjoin Respondents from "continuing to act on behalf of charity for a period of years and an order requiring Respondents the forfeiture of "any compensation they have earned while in violation of § 15 of the Solicitation for Charity Act," J.A. 88; and (d) "punitive damages in an amount equal to the compensatory damages herein and at least $100,000 as to each and every Defendant," J.A. 106.

The Complaint, as variously amended, does not allege Respondents affirmatively misrepresented any fact or failed to honestly answer consumers' questions as to fundraising costs. *Ryan*, 763 N.E.2d at 791. Nor does the Complaint acknowledge any non-monetary benefit VietNow received from these solicitations. Petitioner solely focuses on the percentage of total donations ultimately paid to VietNow.[6] However, Petitioner knew the other benefits VietNow was to receive. The contracts describing these non-monetary benefits are attached to the Complaint. J.A. 21 *et seq*. There is no allegation that VietNow did not receive all of the services to which it was entitled.

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[6] This Court is well-aware that a charity can reap many other benefits from a solicitation besides donations. *See, e.g., Riley*, 487 U.S. at 791-792 and *infra* at II.A. The American Institute of Certified Public Accountants also recognizes such benefits and accounts for fundraising costs by classifying some portion of this expense as program service for the organization depending on the message delivered. *Accounting for Costs of Activities of Not-For-Profit Organizations and State and Local Governmental Entities That Include Fund Raising*, AICPA Statement of Position 98-2, March 11, 1998. *See also* the predecessor document AICPA Statement of Position 87-2.

Although the Complaint alleges fraud, it does not allege specific dates, times of day, conversations, donors, or scripts used which were allegedly fraudulent. J.A. 1 *et seq*. It relies solely on the allegation, expressed in various ways, that fundraising costs are "excessive" as "evidence" that the level of the expenses themselves, as well as calls and other contacts with consumers, were fraudulent.

2. *Petitioner's First Amendment to the Complaint Alleges Common Law Fraud.*

Petitioner amended the Complaint on June 25, 1996. J.A. 83. This amendment continued to focus on the percentage of donations paid by VietNow to Respondents. Complaint ¶ 47A, J.A. 83 *et seq*. This amendment supplements Petitioner's argument that common law fraud requires disclosure of this percentage. J.A. 85 *et seq*.

3. *Petitioner's Second Amendment to the Complaint Also Alleges "Excessive" Fees.*

Petitioner amended its Complaint again on December 4, 1996. J.A. 101. The amendment renumbered paragraphs added by the earlier amendment and added additional allegations and again shows clear hostility to the fees charged by Respondents. *See, e.g.*, Complaint ¶¶ 70(*e.g.* "Such a charge is excessive for fundraising from a prior donor."), 71, 72, and 80. J.A. 103 *et seq*.

Petitioner attached "affidavits" to this pleading signed by donors "disclosing that they would not have given had they known the truth . . ." J.A. 104. These affidavits are the result of biased questions and were not subject to cross examination. At no time did Petitioner disclose any nonmonetary benefit VietNow could receive from a solicitation to the survey participants, despite knowing of these benefits. These

affidavits prove only that the wording of a question often determines its answer.[7]

B. The Claim of Fraud is Based on the Failure to Disclose Fundraising Costs Which Petitioner Arbitrarily Has Classified as "Excessive."

When a paid professional makes an appeal on behalf of a charity to a resident of Illinois, the law requires important disclosures to-wit: that the solicitor is being paid and contracts and reports are on file with and available from the Attorney General. Professional fundraisers are required to truthfully answer any inquiry as to these costs. 225 Ill. Comp. Stat. 460/17 (2000)[8].

Illinois residents thus know that there are costs associated with fundraising and may inquire further if this fact is important to them. 225 Ill. Comp. Stat. 460/18 (2000). Thus, the General Assembly left it to donors to decide when these costs were relevant to their decisions to donate.[9] Petitioner

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[7] The Amicus Brief filed by the United States and the Federal Trade Commission refers to these affidavits regarding affirmative misrepresentations as to fundraising percentage and other aspects of these solicitations. e.g. "all members are volunteers" and ". . . 90% or more goes to the vets." United States and FTC Br. at 4-5. Even if true, Petitioner still did not allege violations of the provisions of the Act, which might prohibit these statements as misrepresentations and require truthful answers to fundraising inquiries. The affidavits are not incorporated into the Complaint or admitted as evidence and are not allegations against Respondents accepted as true for purposes of a motion to dismiss. J.A. 104.

[8] Conversely, when a charity uses its own employees these disclosures are not required. This disparate treatment may cause donors to believe that such solicitations do not have fundraising costs or that costs are lower.

[9] Even experts disagree as to the relationship between the effectiveness of a charity and its fundraising costs. *See e.g.*, "The perception on the part of the public, that [the cost of fundraising benchmark] communicates meaningful information about the management and effectiveness of the organization is seriously misleading for a number of reasons." 1 Phyllis Freedman, "Fundraising Percentages: Do they Really Matter?" *Federation*

seeks to override the decision of the General Assembly and that of the donor with its arbitrary judgment as to when these costs are "excessive." This discretion creates a content-based restriction on speech.

Petitioner seeks to impose a standardless scheme with quasi-criminal enforcement leaving charities to wonder, at their peril, whether their fundraising costs are "excessive in amount."[10] Petitioner argues that common law fraud requires Respondents (and any charity raising funds in any way) to affirmatively volunteer their costs of raising funds—but only if costs are "excessive." Because a charity espousing an unpopular or unusual cause will incur significantly higher fundraising costs that a "mainstream" charity, this burden will fall disproportionately on unpopular groups. Further, as noted, what is "excessive" to one prosecutor may be "reasonable" to another. Moreover, the comparative costs of fundraising vary greatly depending on a host of factors unrelated to fraud. Petitioner may not accomplish indirectly *via* threat of prosecution that which the Constitution bars Petitioner from accomplishing by statute.[11]

Folio of the National Federation of Nonprofits, No. 3, at 1-5 (Oct. 1997).

[10] Counsel for Petitioner argued before the Circuit Court it would be able to distinguish between expenses associated with a golf outing or a dinner dance, and telemarketing expenses. App.1-5. Counsel distinguishes VietNow's fundraising expenses because "there is no economy of scale here. . . . You are really a sucker if you have given one and year—and only fifteen (15) percent of your money in fees to the charity who would give to that." App. 5a. Respondents urge this Court to reject this "know-it-when-I-see-it" approach which empowers Petitioner to judge the worth of free speech. The approach advocated by Petitioner makes it impossible for Respondents and charities to predict what Petitioner will sue as fraudulent *versus* when expenses are "acceptable" because of an "economy of scale" (or otherwise).

[11] One observer of this industry hypothesized that this disclosure would be required to satisfy Petitioner:

> We invite you to send a contribution of $__ to help us start up a new

As in any well-constructed syllogism, Petitioner's argument flows from its premise. If one accepts the premise, the conclusion is inevitable. Petitioner's argument is that fraud is unprotected by the First Amendment, failure to disclose a material fact is fraud, and high fundraising costs are material to fraud. Therefore, Petitioner is justified in prosecuting Respondents for failing to affirmatively disclose the percentage of fees spent on fundraising. Petitioner's premise is mistaken. The cost of fundraising is unrelated to fraud. The First Amendment does not immunize charitable solicitations from fraud prosecutions. However, it prohibits Petitioner from predicating fraud on the failure to "volunteer" fundraising costs.

Petitioner's approach is more invidious to the First Amendment than the statute rejected in *Riley*. Here, there is no legislative restraint on the prosecutor who would have *carte blanche* to determine when the amount of money received by the charity is "trifling" and the other benefits a charity may receive from a solicitation unworthy of consideration. Only the prosecutor knows when disclosure of fundraising costs is required to avoid prosecution.

Petitioner's argument is in conflict with what the General Assembly did say in this area: fundraisers are required to

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> organization, Charity X. If our plans go according to schedule, we will begin to help (the poor, children, etc.) on a small scale within 2 years; and at projected increases for the following three years. Your contribution and most of the money contributed during the early years will perforce be required to build a donor base sufficient to set up the staffing, construction, and programs which we will need. Up to 40% of the funds contributed in the first few years will be paid to the U.S. Government to meet the postal costs of our solicitation.

Suhrke, *What Can be Done About Fundraising "Fraud"?*, XXVI Philanthropy Monthly 11 (July 1993). As Suhrke observes: "Who would contribute to such an appeal? Clearly, very few. A donor would be an exception." *Id.* at 11.

truthfully answer donors' requests regarding fundraising costs and file financial reports accounting for funds received with the Attorney General. 225 Ill. Comp. Stat. 460/18(c) and 460/6 (2000). Petitioner does not allege Respondents violated these laws.

This Court in *Riley* examined compelled speech and specifically rejected it as a legitimate way to educate donors:

> The State asserts as its interest the importance of informing donors how the money they contribute is spent in order to dispel the alleged misperception that the money they give to professional fundraisers goes in greater-than-actual proportion to benefit charity. To achieve this goal, the State has adopted a prophylactic rule of compelled speech, applicable to all professional solicitations. We conclude that this interest is not as weighty as the State asserts, and that the means chosen to accomplish it are unduly burdensome and not narrowly tailored.

Riley, 487 U.S. at 798.

Petitioner argues that its case-by-case disclosure requirement will give charities adequate notice of which solicitations will be prosecuted as fraudulent. Pet. Brief 28. However, Respondents had no such notice, nor can other charities, as the common law has never compelled disclosure of the level of compensation paid to the fundraiser nor defined when costs are "excessive." Nor can there be any guarantee that Petitioner's determination of "excessive" will be consistent with that of other states' attorneys general[12], local prosecutors, private parties within Illinois, or future holders of the office of Illinois Attorney General.

Petitioner argues that future courts will adequately define when costs are so "excessive" as to require forced speech in

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[12] *See* n.2.

solicitations and cure this lack of precedent. Pet. Brief, p.28.[13] This Court has rejected this "standard." In *Riley*, this Court specifically considered a standard of "reasonableness" for fundraisers' fees:

> . . . [T]he burden is placed on the fundraiser in such cases to rebut the presumption of unreasonableness.
>
> According to the State, we need not worry over this burden as standards for determining "[r]easonable fundraising fees will be judicially defined over the years." . . . Speakers, however, cannot be made to wait for "years" before being able to speak with a measure of security.

Riley, 487 U.S. at 793-94.

The arbitrary judgment of the prosecutor is the antithesis of a standard. Few cases will be presented to a judge or jury because the vast majority of Petitioner's complaints will be settled either before litigation or without a trial. Charities would steer a wide berth around Illinois to avoid prosecution. The burden would fall most heavily on small or new organizations, or those with an unusual or unpopular message. This is exactly the type of compelled speech prohibited by the First Amendment. This Court held the compelled disclosure of fundraising expenses

> necessarily discriminates against small or unpopular charities, which must usually rely on professional fundraisers. Campaigns with high costs and expenses carried out by professional fundraisers must make unfavorable disclosures, with the predictable result that such solicitations will prove unsuccessful.

Riley, 487 U.S. at 799.

[13] *E.g.*, Petitioner argues that ". . . vagueness concerns in the First Amendment context are alleviated where a law has received an authoritative judicial construction. [citation omitted]." Pet. Brief 28.

The disclosure would also disrupt each communication made by charity: "[T]he disclosure will be the last words spoken as the donor closes the door or hangs up the phone." *Riley*, 487 U.S. at 800; *Ryan*, 763 N.E.2d at 298-99. This Court has rejected both this motive and indirect infringement on protected rights.

II. THE FIRST AMENDMENT PROHIBITS THE APPLICATION OF COMMON LAW FRAUD TO FORCE AFFIRMATIVE DISCLOSURE OF COMPENSATION PAID TO THE FUNDRAISER.

This Court has rejected all portions of Petitioner's argument: first, the percentage of a donation spent on fundraising is immaterial to whether a solicitation is fraudulent; second, government may not circumvent the First Amendment through indirect means; third, the government's legitimate interest in forcing this disclosure is not directly advanced by this requirement; and fourth, any legitimate interest in this information can be furthered by means less destructive to rights protected by the First Amendment. These include Petitioner's own initiatives to inform prospective donors about fundraising costs and the donors' right to question the fundraiser about costs.

The speech of a charity engaged in advocacy and dissemination of information is entitled to the highest protection of the First Amendment, even when it takes the form of a solicitation to contribute money to that organization. *Riley*, 487 U.S. at 791; *Munson*, 467 U.S. at 967; *Schaumburg*, 444 U.S. at 632. In *Schaumburg* the Supreme Court held that:

> . . . charitable appeals for funds . . . involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes- that are within the protection of the First Amendment.

444 U.S. at 632.

Further, a charity does not lose the protection of the First Amendment if it chooses to use the services of a compensated agent to deliver its speech. As set forth in *Riley*, it is insignificant from a constitutional standpoint that charities choose to use professional representatives to deliver their messages to potential supporters. Any commercial aspect of such solicitations is "inextricably intertwined" with fully-protected speech and, therefore, courts should "apply [the] test for fully-protected expression" to regulations of the speech of charities' professional agents. *Riley*, 487 U.S. at 796.

Thus, while the Petitioner can and does regulate the fund-raising activities of VietNow and other charities, it may do so only through regulations which can withstand strict scrutiny from this Court. To withstand strict scrutiny, a statute must be narrowly tailored to further a compelling governmental interest. *Munson*, 467 U.S. at 959-60; *Schaumburg*, 444 U.S. at 636. Meeting this standard is a burden borne by the Petitioner. *See, e.g., Riley*, 487 U.S. at 789; *Munson*, 467 U.S. at 960-61. This Court has also held that the government has the ability to regulate the content of protected speech to further a compelling interest only if "it chooses the least restrictive means to further the articulated interest." *Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). Petitioner has failed to meet these standards.

A. The First Amendment Protects Speakers' Right to Choose Their Words or to Remain Silent.

The First Amendment protects not only speakers' right to speak, but also their right to choose their words or their right to remain silent. This Court has ruled that just as important as the right to speak is the right not to speak, or to choose the content of one's speech. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974); *Hurley v. Irish-American Gay*

Group of Boston, 515 U.S. 557, 573 (1995). In the context of charitable solicitations:

> [t]here is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees "freedom of speech," a term necessarily comprising the decision of both what to say and what not to say.

Riley, 487 U.S. 796-97. A law requiring disclosure of "the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity . . ." is unconstitutional. *Id.* at 795. Such disclosures were held to be content-based restrictions of speech subject to strict scrutiny. *Id.* It is irrelevant that Petitioner's action compels disclosures instead of directly silencing VietNow's speech. There is no distinction between the two in First Amendment analysis. *Id.* at 797.

Similarly, the First Amendment protects a speaker's choice of how to speak—in this situation how a charity chooses to raise the funds needed to support its purposes. *Riley*, *Munson* and *Schaumburg*, all rejected the constitutionality of ordinances or statutes which impinged on speech based on the "excessiveness" of a fundraiser's fee. *Riley*, 487 U.S. at 789; *Munson*, 467 U.S. at 966-67; *Schaumburg*, 444 U.S. at 635-37. In *Riley*, this Court summarized the prior cases and concluded ". . . we are unpersuaded by the State's argument that its three-tiered, percentage-based definition of 'unreasonable' passes constitutional muster." *Riley*, 487 U.S. at 789.

The Constitution presumes that the decision as to how a charity best can raise funds to further its goals is best made by the charity, not the government. *Id.* at 791. This Court held

> . . . [T]he government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listener; free and robust debate cannot thrive if directed by the government.

. . .

> [T]here are several legitimate reasons why a charity might reject the State's overarching measure of a fundraising drive's legitimacy—the percentage of gross receipts remitted to the charity. For example, a charity might choose a particular type of fundraising drive, or a particular solicitor, expecting to receive a large sum as measured by total dollars rather than the percentage of dollars remitted. Or, a solicitation may be designed to sacrifice short-term gains in order to achieve long-term, collateral, or noncash benefits. To illustrate, a charity may choose to engage in the advocacy or dissemination of information during a solicitation, or may seek the introduction of the charity's officers to the philanthropic community during a special event (e.g., an awards dinner). Consequently, even if the State had a valid interest in protecting charities from their own naivete or economic weakness, the Act would not be narrowly tailored to achieve it.

Id.

Nor is Respondents' speech protected at a lesser level than fully-protected speech and subject to a different standard of review with regard to forced speech. *E.g.*, *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985). Any commercial aspect of Respondents' speech is "inextricably intertwined" with fully-protected speech, such that the Constitution provides plenary protection. *Riley*, 487 U.S. at 796.

Petitioner may not judge the "worth" of VietNow's solicitations based on fundraising costs alone nor use this measure as a substitute for proving fraud.[14]

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[14] *E.g.*, Counsel for the Petitioner before the Circuit Court argued "People know that there are cost [sic]. But eighty-five percent (85%) is ridiculous . . . ." App. 5a. *Riley*, of course, rejected the notion that charities need the government to advise them regarding contracting issues: ". . . [t]he state's generalized interest in unilaterally imposing its notions of fairness on the fundraising contract is both constitutionally invalid and insufficiently related to a percentage-based test." 487 U.S. at 792. Hopkins, *supra.* at n.2, shows that even the nonprofit community disagrees as to what factors should be included in fundraising costs.

B. Petitioner Would Impose a Content-based Restriction on Speech.

Forcing a speaker to say what the speaker would not otherwise say necessarily changes the content of that speech and is subject to exacting First Amendment scrutiny. In *Riley*, the Court held "[m]andating speech that a speaker would not otherwise make necessarily alters the content of that speech. We therefore consider the Act as a content-based regulation of speech." 487 U.S. at 794. Content-based restrictions on speech are presumptively unconstitutional. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

This Court has already considered a requirement that fundraisers disclose the percentage of charitable contributions collected which were actually paid to charity. *Riley*, 487 U.S. at 798. This Court rejected the disclosure as a content-based regulation of speech. 487 U.S. at 795; *see also McIntyre v. Ohio Elections Comm'ns*, 514 U.S. 334, 348-49 (1995); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Tornillo*, 418 U.S. at 257-58; *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

This Court held that no legitimate state interest justified a statute which compelled disclosure of fundraising costs. *Riley*, 487 U.S. at 798. Alternative means exist such as public education and prosecution of fraud accomplish Illinois' purpose without intruding on speech. *Id.* at 800.

The Constitution protects speech from infringements arising from common law just as it does if infringements are based on statutes. *N.Y. Times v. Sullivan*, 376 U.S. 254, 265

(1964). It makes no difference to First Amendment analysis whether speech is restricted by a pre-donation regulation or a post-donation prosecution. *Munson*, 467 U.S. at 969.

C. Application of Strict Scrutiny Shows Petitioner is Acting Unconstitutionally.

To withstand strict scrutiny, a statute must be narrowly tailored to further a compelling interest which the state is entitled to protect. *Munson*, 467 U.S. at 959-60; *Schaumburg*, 444 U.S. at 636. Meeting this standard is a burden borne by the state. *See, e.g.*, *Riley*, 487 U.S. at 789; *Munson*, 467 U.S. at 960-61. Government has the ability to regulate the content of protected speech to further a compelling interest only if "it chooses the least restrictive means to further the articulated interest." *Sable Communications,* 492 U.S. at 126.

Petitioner's application of common law fraud to compel the disclosure of "excessive" costs cannot withstand strict scrutiny. First, there is no legitimate government purpose advanced by the disclosure. Neither prevention of fraud nor consumer education satisfies this test. This Court has ruled that the percentage is unrelated and immaterial to common law or statutory fraud. Further, although consumer education is important, it is not a "compelling" reason which justifies infringement upon protected speech. *Riley*, 487 U.S. at 799.

In *Riley*, the State of North Carolina asserted that the purpose of fully informing donors was advanced when attempting to justify disclosures applicable to solicitations made by professional solicitors, (i.e., the disclosures did not apply to solicitations made by volunteers or employees of a charity). The Supreme Court observed that:

> [t]he State asserts as its interest the importance of informing donors how the money they contribute is spent in order to dispel the alleged misperception that the money they give to professional solicitors goes in greater-than-actual proportion to benefit charity. To

> achieve this goal, the State has adopted a prophylactic rule of compelled speech, applicable to all professional solicitations. We conclude that this interest is not as weighty as the State asserts, and that the means chosen to accomplish it are unduly burdensome and not narrowly tailored.

Riley, 487 U.S. at 798.

It is uncertain how Petitioner's disclosure of "excessive" costs could advance the prevention of fraud, especially when much more specific, non-prophylactic state and federal laws prohibit fraud and require disclosure of fundraising expenses to Petitioner and other entities. The Act itself contains many disclosure requirements which educate the public without creating a contrary-to-fact impression that high fundraising costs indicate of fraud. *Infra.* at III.A. Nor would forced speech prevent fraud, as it is unlikely that those who would commit fraud would include a truthful disclosure in their solicitations.

The Petitioner's Complaint and amendments show Petitioner's true intention is to burden Respondents with an unfavorable disclosure such that their appeals are silenced. Other charities will be chilled by the unfettered and amorphous nature of this disclosure requirement. Because the disclosure cannot withstand scrutiny as a content-based restriction of protected speech, this Court should reject this attempt to circumvent the First Amendment.

1. *There is No Nexus Between Fundraising Expenses and Common Law Fraud.*

Petitioner's premise that the percentage of fees paid by a charity to its fundraiser is material to whether the solicitation is fraudulent has been repeatedly rejected by this Court: "there is no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent. . . ." *Riley*, 487 U.S. at 793, citing *Munson*, 467 U.S. at 950. A charity has many good reasons to place more

importance on other aspects of fundraising than the percentage returned to it. *Riley*, 487 U.S. at 798.

It makes no difference that a donor would be unlikely to donate if this information were disclosed or that the information is "fact" as opposed to opinion:

> These cases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of "fact": either form of compulsion burdens protected speech. Thus, we would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget. Although the foregoing factual information might be relevant to the listener, and, in the latter case, could encourage or discourage the listener from making a political donation, a law compelling its disclosure would clearly and substantially burden the protected speech.

Riley, 487 U.S. at 798. The presumption that a donor would be unlikely to give when this disclosure is compelled may be Petitioner's true motive. The disclosure would effectively silence Respondents even though such a result would be unconstitutional if attempted directly. While disclosure of this fact may or may not be relevant to whether a person chooses to donate to a charity, it nonetheless is immaterial to fraud.

It is settled law that the "worth" of a charitable solicitation is not affected by the cost of making the solicitation. Equating "cost" to "worth" is simplistic, improper and erroneous. This approach ignores the many benefits a charity can reap besides the percentage of funds received.[15] This Court has

[15] VietNow's contract with Respondents did not require it to invest any resources or personnel in its fundraising effort. J.A. 90 *et seq.* Because VietNow was organized, in part, to ". . . help increase community awareness of the problems and readjustments encountered by Vietnam veterans and his family", J.A. 16, every telephone and mail contact Respondents made potentially furthered this goal even if it did not result in a monetary donation. VietNow was held harmless of any risk that the fundraising campaign would lose money and received a $20,000 advance at the time the contract was signed plus 15% of the gross donations received. Respondents assumed all facility rent, utility bills and creative expense. Respondents also produced a magazine, paid for registration fees; and provided and staffed a nationwide 800 number. Petitioner made no allowance for any of these benefits in determining the percentage figure used in the Complaint. Further, Respondents bore the risk of failure and had to satisfy all these expenses prior to generating any profit. There is also no accounting for donations of nonmonetary items such as cars, clothing or furniture that may have been made based on Respondents' calls. Similarly, some donors may have chosen to include VietNow in their planned giving as a result of these calls or chosen to volunteer for this or other veterans organizations, e.g "Another nonmonetary goal [of fundraising] is to attract volunteers, and fundraising campaigns often accomplish this goal as a side effect of raising money." Richard Steinberg, The Economics of Fundraising, in *Taking Fundraising Seriously*, at 239-256, (Dwight F. Burlinggame and Lamont J. Hulse, eds., 1991).

consistently rejected the premise that the measure of percentages is related to whether a solicitation is fraudulent.

2. *Petitioner's Argument is Not Narrowly Tailored to Prevent Fraud.*

Compelled disclosure of fundraising expenses has been rejected by the Court as an overbroad, prophylactic measure to accomplish goals which may be achieved by less intrusive means. Forcing a charity to include a disclosure of the percentage of the donation spent on fundraising is not the type of "fine" tool required when government regulates speech. *See e.g. Speiser v. Randall*, 357 U.S. 513, 525 (1958).

When considering the forced disclosure of fundraising percentage in North Carolina, this Court noted that ". . . to achieve this goal, the State has adopted a prophylactic rule of compelled speech, applicable to all professional solicitations. We conclude that this interest is not as weighty as Petitioner

asserts, and that the means chosen to accomplish it are unduly burdensome and not narrowly tailored." *Riley*, 487 U.S. at 798. The Court noted several "more benign and narrowly tailored" ways North Carolina could advance its interests in manners less burdensome to First Amendment freedoms including publication of the forms which state law requires fundraisers to file which disclose their fees,[16] and enforcement of anti-fraud laws. *Riley*, 487 U.S. at 800.

Similarly, if Petitioner or *amici* is concerned about inurement of donations to private parties, they should allege and prove facts supporting such allegations and not rely solely on costs as a substitute measure. High fundraising costs, alone, however, are not related to inurement, self-dealing or fraud and cannot be used as a substitute measure for these violations. *United Cancer Council, Inc. v. Comm'r of Internal Revenue*, 165 F.3d 1173 (7th Cir. 1999) ("*UCC*").

Illinois donors are also free to inquire as to fundraising expenses. Petitioner could and should encourage its citizens to do so. Respondents' answers are required to be truthful. 225 Ill. Comp. Stat. 460/18 (2000). Even if it did not answer donors' requests in this area, "if the solicitor refuses to give the requested information, the potential donor may (and probably would) refuse to donate." *Riley*, 487 U.S. at 800.

Petitioner would have the Court believe that infringement on speech is acceptable if it sues one defendant at a time. This argument is fundamentally mistaken with regard to the meaning of "narrowly tailored," which does not mean "selectively prosecuted" but, rather, "narrowly tailored" so as to have the least adverse effect on free speech rights, even the speech rights of one speaker. *Riley*, 487 U.S. at 800; *Ryan*, 763 N.E.2d at 297. Suing charities *seriatim* for violating prosecutor's varying interpretations of "excessive" casts a

[16] *E.g.* 225 Ill. Comp. Stat. 460/6 (2000).

pall over the exercise of free speech. This is far from "narrowly tailored."

3. *Petitioner's Disclosure Requirement Disproportionately Affects Small or Unpopular Charities.*

The effect of Petitioner's argument would be devastating to innumerable charities, particularly charities most in need of First Amendment protection, i.e., small, weak or new charities which are more likely to have high fundraising expenses than more established groups. Fundraising costs, whether incurred by a charity internally or paid to a professional fundraiser, vary widely depending on many factors, including many outside of a charity's control. *Riley*, 487 U.S. at 791-92; *Munson*, 467 U.S. at 961-62, 967; *Schaumburg*, 444 U.S. at 636-37 n.10.

Petitioner's theory applies to every form of fundraising. Direct mail would be particularly vulnerable to this disclosure as would a failed capital campaign or special event[17]. Forced speech with regard to an issue immaterial to fraud, further, punishes small or weak charities which are least likely to be able to survive such actions—the very parties whose speech rights are most at risk and must be protected in a free society.

Riley held that a law requiring disclosure by professional solicitors of the percentage of funds collected in the previous twelve months that were ultimately received by the charity:

> . . . necessarily discriminates against small or unpopular charities, which must usually rely on professional solicitors. Campaigns with high cost and expenses carried out by professional solicitors must make unfavorable

[17] "Experienced fundraisers seem to agree that direct-mail prospecting is considered successful if it breaks even." Janet S. Greenlee and Theresa P. Gordon, "The Impact of Professional Solicitors on Fundraising in Charitable Organizations", 27 *Nonprofit and Voluntary Sector Quarterly* at 284 (1998).

> disclosures, with the predictable result that such solicitation will prove unsuccessful. Yet the identical solicitation with its high costs and expenses, if carried out by the employees of a charity or volunteers, results in no compelled disclosure, and therefore greater success.

Riley, 487 U.S. at 799.

Nor does Petitioner's case-by-case prosecution of particular charities or fundraisers vitiate the effect of this disclosure on the groups most in need of First Amendment protections. "Laws designed or intended to suppress the expression of specific speakers contradict basic First Amendment principles." *United States v. Playboy Entm't Group*, 529 U.S. 803, 879 (2000).

In the *Playboy* decision, this Court considered a law which restricted broadcast of adult television programs. In the legislative history to the law, a sponsor specifically named Playboy as the target of the law. *Id.* at 812. The law was therefore content- based.

Petitioner's common law scheme of case-by-case prosecutions based on failure to disclose fundraising costs is identical in effect to a law intended to suppress the speech of one speaker. Petitioner continues to express hostility to Respondents based on their fundraising fees alone.[18] The attempt to create a new requirement of common law applied to Respondents alone, and heretofore unrecognized by the State or courts, is content-based for this reason.

[18] The Complaint does not, however, allege the contract between VietNow and Respondents was other at "arms-length.". As noted at the Petitioner's website, it is common for professional fundraisers to be paid 80-90% of the funds received from their solicitations. http://www.ag.state.il.us/charitable/donor.html. One survey of fundraising by different types of charities using professional solicitors noted that, on average, "Veterans groups received less than 17 cents on the dollar. . ." Harvey Lipman, *Calling Solicitors to Account*, The Chronicle of Philanthropy, April 5, 2001. Are all of these organizations guilty of fraud, or is soliciting support for this type of organization expensive in a competitive marketplace?

Petitioner's argument disproportionately affects Respondents, as well as small, new or unpopular charities. This result violates the First Amendment.

4. *Petitioner's Interest in Education Is Better Furthered By Narrower Means.*

Numerous state and federal agencies require charities to disclose information including fundraising expenses. *Infra* at § III. A. These agencies are free to share and distribute this information as they see fit and use it to educate the public.[19] Petitioner's interest in education gives consumers too little credit and is not as weighty as represented. Donor education does not justify forced speech because "[d]onors are also undoubtedly aware that solicitations incur costs, to which a part of their donations may apply." *Riley*, 487 U.S. at 800.

These agencies are not free, however, to force speakers to educate donors at their expense simply because the agencies feel this disclosure would be more educational or effective if included in the solicitation itself. The First Amendment does not permit Petitioner to sacrifice speech for expedience. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 430 (Thomas, J., dissenting.), *citing Schneider v. State*, 308 U.S. 147, 162 (1939) ("There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets.").

[19] The Petitioner educates donors regarding this topic at its website which states: "Professional fund-raisers often charge 80% to 90% of your contribution as a fee. Consider funding volunteer organizations." "Be an Informed Donor," *available at* http://www.ag.state.il.us/charitable/donor.html. It is important to note that the website does not add "these solicitations are fraudulent" or "common law requires fundraisers to disclose their expenses." *See also* 225 Ill. Comp. Stat. 460/22.

This Court rejected efficiency as a justification for infringing on charitable solicitations in *Schaumburg*:

> 'Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than . . . [deciding in advance] what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.' *Schneider v. State*, *supra*, at 164.

444 U.S. at 639.

The goal of educating the public is laudable but does not justify compelled speech. "The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." *McIntyre*, 514 U.S. at 349.

Because there are narrower means available to further the educational goals of Petitioner, including laws already enacted by the General Assembly, *e.g.* 225 Ill. Comp. Stat. 460/22(2000), common law cannot be construed to require compelled disclosure of a fundraising percentage during the solicitation.

D. Petitioner Cannot Indirectly Impose a Forced Speech Requirement.

By creating a legal disclosure requirement using common law fraud, Petitioner would impose a standardless scheme of compelled speech, accomplishing what this Court has forbidden Petitioner from accomplishing directly:

> As we have often noted, "'[c]onstitutional rights would be of little value if they could be . . . indirectly denied.'" *Harman v. Forssenius*, 380 U.S. 528, 540 (1965), quoting *Smith v. Allwright*, 321 U.S. 649, 664 (1944). The Constitution "nullifies sophisticated as well as simple-minded modes" of infringing on Constitutional protections. *Lane v. Wilson*, 307 U.S. 268, 275 (1939); *Harman v. Forssenius*, 380 U.S. at 540-541.

U.S. Term Limits v. Thornton, 514 U.S. 779, 829 (1995).

Petitioner's forced disclosure is exactly the type of infringement this Court has forbidden in the First Amendment context in the context of charitable solicitations. This Court should reject this attempt to dress a compelled speech requirement in the clothing of fraud.

1. *Indirect Restrictions Impinging Upon First Amendment Protections are Unconstitutional.*

The First Amendment guarantees speakers not only the freedom to choose what to say but also requires that laws give free speech sufficient "breathing room," such that speakers are not silenced by the threat of lawsuit or prosecution. *N.Y. Times,* 376 U.S. 254 at 272. Such protections and breathing room would be of little effect if they could be thwarted by shifting legal theory or changes in phrasing.

This Court examined this question in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). In that case, Falwell, a public figure, sued the Hustler Magazine for libel and intentional infliction of emotional distress based on the Petitioner's publication of a satirical cartoon featuring the Respondent. *Id.* at 48-49. Although lower courts applied the "actual malice" standard set forth in *N.Y. Times* to Falwell's libel claim, they did not apply the "actual malice" standard to Falwell's emotional distress claim. *Id.*

This Court rejected this holding. The same protections afforded speakers with regard to libel claims from public figures must apply to other types of tort liability to adequately protect free speech: "were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject." *Id.* at 54.

Application of the "actual malice" standard to the tort of intentional infliction of emotional distress is necessary with regard to public figures to give "adequate 'breathing space' to the freedoms protected by the First Amendment." *Id.* at 56.

This breathing space is necessary to protect the First Amendment rights of Respondents and innumerable charities facing imposition of Petitioner's standardless disclosure requirement. *Riley*, and its predecessors, make clear the relative percentage spent on fundraising costs is unrelated to fraud. Accordingly, Illinois cannot sue for fraud if the fundraiser charity fails to "volunteer" the percentage when Petitioner finds it "excessive." The importance of "breathing room" increases as fundraising costs increase, as smaller or unpopular charities are more likely to have high costs. *Riley*, 487 U.S. at 799. *Munson* noted the relationship between this percentage and fraud was "little more than fortuitous." 467 U.S. at 966. Because the First Amendment can not be avoided by shifting terminology, the Court should reject this argument.

2. *Indirect Restrictions on Constitutional Rights are Forbidden in the Context of Charitable Solicitations.*

Indirect restrictions on charitable solicitations are also subject to strict scrutiny under the First Amendment.

Other courts have recognized that government may not use a substitute measure to express an improper judgment regarding a charity's fundraising choices. In *UCC*, 165 F.3d at 1173, Chief Judge Richard Posner considered the argument of the Internal Revenue Service ("IRS") that a charity with high fundraising costs over a period of time should have its tax-exempt status revoked because donations inured to the benefit of the fundraiser. *Id.* at 1175. Posner noted that:

> The Service's point that has the most intuitive appeal is the high ratio of fundraising expenses, all of which went to [the fundraiser] because it was [the charity's] only fundraiser during the term of the contract, to net charitable proceeds. Of the $28-odd million that came in, $26-plus million went right back out, to [the fundraiser].

Id. at 1178.

Chief Judge Posner held, however, that "the ratio of expenses to net charitable receipts is unrelated to the issue of inurement." The IRS' argument, he continues, "threatens to unsettle the charitable sector by empowering the IRS to yank a charity's tax exemption simply because the Service think its contract with it major fundraiser too one-sided in favor of the fundraiser. . ." *Id.* at 1179.

He concluded:

> It is hard enough for new, small, weak, or marginal charities to survive, because they are likely to have a high expense ratio, and many potential donors will be put off by that. The Tax Court's decision if sustained would make the survival of such charities even more dubious, by enveloping them in doubt about their tax exemption.
>
> We were not reassured when the government's lawyer, in response to a question from the bench as to what standard he was advocating to guide decision in this area, said that is was the "facts and circumstances" of each case. That is no standard at all, and makes the tax status of charitable organizations and their donors a matter of the whim of the IRS.

Id.

This Court has also rejected the argument that a present requirement to be judicially defined in future years provides meaningful notice to speakers as to what conduct will be prosecuted. *Riley*, 487 U.S. at 793-94. Such a situation imposed the costs of litigation on speakers and are "in direct contravention of the First Amendment's dictates." *Id.* at 794.

Chief Judge Posner's logic applies to Petitioner's claim that the "facts and circumstances" of each case will determine

when fundraising costs are so high as to be "excessive" and therefore require the onerous disclosure. Pet. 28. Currently, Petitioner argues that 15% is "trifling" because 85% is "excessive in amount," therefore a disclosure is required. J.A. 9. Charities spending 84% and less are left to wonder where "trifling" ends, leaving them unable to choose their own words without fear of prosecution.

If an Illinois charity paid a movie star a substantial amount to raise support but was unsuccessful would it have committed fraud? Would charities contacting prospective donors commit fraud because those contacts were more expensive than contacting existing donors? Petitioner alone has the "answers" to these questions. Similarly, Petitioner would favor a charity with lower fundraising costs over other groups even if that organization had high salaries, travel expenses or entertainment budget.

Because there is no standard governing Petitioner's discretion, no charity could raise funds without fear of prosecution and resulting chill on free speech.

III. LESS INTRUSIVE MEANS WILL ACCOMPLISH PETITIONER'S LEGITIMATE GOALS.

Although fundraising expenses are unrelated to fraud, Petitioner has many tools to advance legitimate goals. First, Petitioner may educate the public regarding issues it considers to be important with regard to charitable fundraising. Second, Petitioner may continue to enforce the many filing and disclosure requirements found in the Act. Finally, Petitioner can sue those who make affirmative misrepresentations in violation of the Act.

A. Disclosure to the Government and Education of the Public Are Both Less Intrusive Available Means.

Educating potential donors is a worthy goal which can be advanced by Petitioner. *Riley*, 487 U.S. at 800. The General

Assembly and other government agencies have answered this call and provide Petitioner means with less impact on free speech than compelled disclosure.[20]

Government requires extensive disclosures of charities. The IRS requires charities to file annually a six-page Form 990 (Return of Organization Exempt from Income Tax), a six-page Schedule "A" to Form 990 specifically designed for charities, and a list of major donors.[21]

Almost all of states and many localities require charities and professional fundraisers to register and file regular reports on activities particularly fundraising costs. These jurisdictions generally require charities to report information above and beyond the information required on Form 990, as well as requiring fundraisers to provide extensive information.

The Illinois General Assembly has specifically directed Petitioner educate the public concerning solicitation issues appropriating funds for this purpose.[22]

Each charity that solicits contributions from persons in Illinois is required to file annually with the Attorney General

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[20] Counsel on behalf of Petitioner admitted to the Circuit Court that "There's no doubt that public information is really one of the keys to this process." App. 6a.

[21] *See* IRS Form 990, Part II (requiring a breakdown of fundraising costs and information about "joint costs" for combined educational and fundraising campaigns).

[22] "All fees and penalties collected by the Attorney General pursuant to this Act shall be paid and deposited into the Illinois Charity Bureau Fund in the State Treasury. Moneys in the Fund shall be appropriated to the Attorney General for charitable trust enforcement purposes as an addition to other appropriated funds and be used by the Attorney General to provide the public with information concerning charitable trusts and organizations and for charitable trust enforcement activities." 225 Ill. Comp. Stat. 460/22 (2000).

a copy of its IRS Form 990, an Illinois Charitable Organization Annual Report (Form AG990-IL), an Individual Fundraising Campaign report (Form IFC) for each campaign in which the charity used a paid professional fundraiser, and audited financial statements if either the charity's gross contributions for the year exceeded $150,000 or it used a paid professional fundraiser that raised in excess of $25,000. 225 Ill. Comp. Stat. 460/4 (2000.

Professional fundraisers are required to periodically file a financial report (Form PFR-02), a compensation report (Form PFR-04), an explanation of fundraising fees (Form PFR-05), and a Form IFC for each fundraising campaign conducted. 225 Ill. Comp. Stat. 460/6 (2000). They are also required to annually file a registration statement (Form PFR-01), a list of charities and contracts (Form PFR-06), a copy of each fundraising contract, and a bond. 225 Ill. Comp. Stat. 460/7 (2000).

Petitioner, in fact, appears to have based its Complaint primarily on information from filings that Respondents made. *See* J.A. 21-35, 41-82 (financial reports filed by respondent Telemarketing Associates, Inc.), 90-100.

Failure to provide the required reports can lead to severe penalties. The IRS late filing penalties are $20 per day, increased to $100 per day for charities with over $1 million in annual gross receipts. 26 U.S.C. § 652(c)(1)(A) (2002). Petitioner can impose fines, require professional fundraisers to forfeit any compensation they have received, seek injunctive relief to prevent a charity or fundraiser that has not filed the required reports or registered from soliciting and even file criminal charges. *See, e.g.*, 225 Ill. Comp. Stat. 460/2(I), 460/6(g) & (h), 460/7 (g) & (h), 460/9(g), 460/9(h) (2000).

Both government and private parties make this information available to the public. All of the information reported to the

IRS, except for the names, addresses and other identifying information for the major donors, is available to the public from the IRS on request. 26 U.S.C. § 6104(a)(1), (b) (2002); 26 C.F.R. § 301.6104(b)-1 (2002). All charities are also required by law to provide copies of Form 990 and schedules, except for information about major donors, to any person who requests a copy. 26 U.S.C. § 6104(d) (2002).

Information filed with a state is generally available on request from the appropriate agency, usually either the Attorney General or the Secretary of State. In Illinois, any reports and documents filed with the Attorney General are open to public inspection. 225 Ill. Comp. Stat. 460/2(f) (2000). Petitioner's office also provides copies of reports it receives for a nominal fee. *See* www.ag.state.il.us/charitable/aboutcharitydb.htm.

Many states have placed the reports they receive from charities and professional fundraisers on the Internet. Both VietNow's Form 990 and its audited financial statement show the amount of contributions received by VietNow which are spent on fundraising costs. 2000 VietNow Form 990, Part I, line 15 & Part II, column (D); VietNow June 30, 2001 Financial Statement 3, 7. Petitioner also provides an Internet accessible database to allow the public access to the reports it receives.[23]

Finally, many private organizations encourage transparency with regard to the finances of charities. Media also scrutinize charitable fundraising rating organizations and educating the public, in part, on fundraising expenses.[24]

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[23] *See* www.ag.state.il.us/charitable/charity.html.

[24] *See, e.g.*, "Charity Navigator", *available at* http://www.charitynavigator.org/index.cfm/bay/content.press.htm, containing links to more than twenty recent examples of coverage in television, print and electronic media.

All of these requirements and groups further donor education and are less intrusive than compelled speech. None of the above interfere with a speaker's right to choose his or her own words or remain silent. None of the above sacrifice the right of speakers to choose their words because it is inconvenient. Because these less intrusive means exist to educate the public concerning charitable fundraising issues, forced disclosure of "excessive costs" is improper.

B. Government Can and Does Enforce Fraud Laws to Protect Consumers.

Petitioner would require disclosure of a fact that this Court has ruled is immaterial to the issue of fraud, *Riley*, 487 U.S. at 793, and of which donors are "undoubtedly aware." *Id.* at 799, 804. Petitioner has therefore not advanced a valid or cognizable claim for fraud, but rather dressed compelled speech, i.e. words that Petitioner thinks Respondents should say, in the guise of common law fraud prosecution for what Respondents did not say.

This Court has been clear that Petitioner may enforce its fraud statutes to regulate charitable fundraising, but this holding assumes that regulators will use this power legitimately and not as a bypass to negate the First Amendment. When this Court ruled that a State may "vigorously enforce its antifraud laws . . .", *Riley*, 487 U.S. at 800, it did not add "to require this disclosure." *Id.* Such an addition would negate the opinion of the Court in that very case. This Court ruled that fundraising costs are immaterial to fraud and their disclosure could not be compelled. *Riley*, 487 U.S. at 793. Nor can Petitioner use fundraising expense as a substitute for pleading and proving fraud. *Schaumburg*, 444 U.S. at 639. "Vigorous enforcement" of fraud laws, common or otherwise, cannot mean that Petitioner can use failure to disclose immaterial facts to make a fraud case.[25]

[25] There is no lack of cases showing government has been able to prove actual fraud in the course of charitable solicitations. *See, e.g., People v. Knippenberg*, 757 N.E. 2d 667 (Mo. App. 2001); *United States v. Ciccone*, 219 F.3d 1078 (9th Cir. 2000); *United States v. Kinney*, 211 F.3d 13 (2d Cir. 2000); *People v. Orange County Charitable Services*, 73 Cal. App. 4th 1054 (Cal. App. Ct. 1999); *FTC v. Saja*, 1997 U.S. Dist. Lexis 17225 (D. Ariz. 1997); *People ex rel. Scott v. Gorman*, 421 N.E. 2d 228 (Ill. App. Ct. 1981); *People v. Caldwell*, 290 N.E.2d 279 (Ill. App. Ct. 1972); *People v. French*, 762 P.2d 1369 (Colo. 1988); *Telemarketing Fraud Bulletin*, National Association of Attorneys General, October 2002, "California Announces Charities Indictments", "New York Sues All-Pro Telemarketing Associates Corporation," at 1, 7.

1. *Fraud Requires Misrepresentation of Material Facts.*

Because Illinois law requires that fundraisers tell each donor a call is being made by a paid fundraiser, the donor realizes that there is a cost to charity associated with the call. Whether that fact is relevant is the donor's decision. If it is, the donor may ask the fundraiser about compensation. As noted, Illinois law requires the fundraiser to answer truthfully. 225 Ill. Comp. Stat. 460/18 (2000). Nor may Petitioner substitute its judgment as to the importance of fundraising costs for that of the charity and the donor. *Riley*, 487 U.S. at 791. Fundraising costs may or may not be relevant to some donors, but they are not material to fraud, nor can or should Petitioner decide for a charity how best to speak. Fundraising efficiency alone does not measure the worth of an organization. A connection to the cause and a desire to advance it may be far more important to a prospective supporter.

Essential to the cause of action for deceit is an intent to deceive, to mislead, to convey a false impression under cir cumstances creating a duty to speak. *Perlman v. Time, Inc.*, 380 N.E.2d 1040, 1044 (Ill. App. Ct. 1978); *Soules v. Gen. Motors Corp.*, 402 N.E.2d 599, 601 (Ill. 1980); W. Prosser, *Torts*, § 107, at 700 (4th ed. 1971). The Illinois Supreme Court has held that the concept of fraud implies a wrongful

intent, an act calculated to deceive. *Exline v. Weldon*, 311 N.E.2d 102, 105 (Ill. 1974); *Zeve v. Levy*, 226 N.E.2d 620, 623 (Ill. 1967); *Dahlke v. Hawthorne, Lane & Co.*, 222 N.E.2d 465, 467 (Ill. 1966). *See also First Nat'l Bank v. Insurance Co. of N. Am.*, 424 F.2d 312, 318 (7th Cir. 1970); *Paskas v. Illini Fed. Sav. & Loan Assoc.*, 440 N.E.2d 194, 199 (Ill. 1982); *Cokinis v. Maywood-Proviso State Bank*, 401 N.E.2d 1063, 1077 (Ill. 1980).

A fact may or may not be relevant to whether a consumer makes a donation or not, but relevancy does not necessarily make that fact material to the donation. *Riley*, 487 U.S. at 798. *Riley* specifically noted that:

> We would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget. Although the foregoing factual information might be relevant to the listener, and, in the latter case, could encourage or discourage the listener from making a political donation, a law compelling its disclosure would clearly and substantially burden the protected speech.

Id. at 798. Other facts might also be relevant such as the compensation of the highest paid employees of the organization, its travel budget or the amount ultimately spent on program service. Petitioner can no more compel disclosure of these facts than fundraising percentage as they are immaterial to whether the solicitation is fraudulent. This compelled speech lacks any standard as to when the obligation to "volunteer" facts which Petitioner might consider relevant to the donor's decision ends, and the charity's right to choose its own words resumes.

Just because something may be relevant to whether the donor donates, does not mean it is material, *Riley*, 487 U.S. at

798; *McIntyre*, 514 U.S. at 352, nor that there is a duty to disclose it. For example, in *In re Witt*, 583 N.E. 2d 526 (Ill. 1991), the Illinois Supreme Court ruled that a judge had no duty to disclose a legitimate loan, and, therefore, failure to make that disclosure was not fraud. *Id.* at 533.

Nor is there a duty to disclose any fact immaterial to fraud during a fundraising telephone call. This duty is not found in the Act, nor can it be supported by common law. The Act, further, contains restrictions on this very topic and does not explicitly or implicitly set forth this duty. If the duty exists at common law, further, the statutory requirement to provide this information upon request would be meaningless. 225 Ill. Comp. Stat. 460/17(b). Fundraising expense alone has no "nexus" with fraud and is not a material measure of fraud as a matter of law. *Riley* at 793.

2. *Failing to Disclose a Fact the Consumer "Undoubtedly Knows" is Not Fraud.*

The common law requires that a person be harmed or prejudiced for fraud to incur. *E.g.*, *People v. Brown*, 72 N.E.2d 859, 861-62 (Ill. 1947); *People v. Mau*, 36 N.E.2d 235, 237-39 (Ill. 1941).

As set forth in *Riley*, high fundraising costs do not necessarily mean that any donor has been harmed. First, this argument presumes that the charity receives no benefit from funds it does not directly receive. This presumption is false because there are many ways a charity could benefit, and decide to solicit, besides the amount of money returned by a campaign. *Riley*, 487 U.S. at 798. One easy example of a nonmonetary benefit is the persuasion of individuals contacted to refrain from drinking and driving, or polluting our planet.

Second, donors are undoubtedly aware that "solicitations incur costs, to which part of their donation might apply." *Riley*, 487 U.S. at 799. The Petitioner knows VietNow's costs

and may educate the public concerning them. *Supra.* at III.A. Failing to disclose something which the donor already "undoubtedly" knows is not material or misleading nor could the donor be harmed by such an omission.[26]

IV. RESPONDENTS' FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS WOULD HAVE BEEN VIOLATED HAD THE QUASI-CRIMINAL ACTION FOR FRAUD PROCEEDED.

Petitioner also failed to give Respondents fair warning that their conduct could result in the imposition of punitive measures in violation of fundamental due process under the Fourteenth Amendment.

Respondents had no reason to know their conduct could subject them to quasi-criminal liability. Illinois failed to provide any notice that such conduct could subject Respondents to penal sanctions. Respondents' conduct conformed to the requirements of Illinois statutes regulating solicitations by professional fundraisers and, moreover, occurred within the sphere of First Amendment protections announced in *Schaumburg, Munson* and *Riley*.

The Due Process Clause of the Fourteenth Amendment requires states to provide fair notice of the types of conduct which will subject the actor to criminal or quasi-criminal sanctions. *See United States v. Lanier*, 520 U.S. 259 (1997). Strict standards should be applied to constructions of laws "having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith v. California*,

[26] ". . . Since donors are assuredly aware that a portion of their donations may go to solicitation costs . . . it is not misleading in the great mass of cases for a professional solicitor to request donations 'for' a specific charity without announcing his professional status." *Riley*, 487 U.S. at 804 (Scalia, J., dissenting.)

361 U.S. 147, 151 (1959). Special care must be taken to require the State to provide fair warning of the types of conduct which will subject speakers to punitive sanctions. *Marks v. United States*, 430 U.S. 188, 196 (1977); *Hynes v. Mayor and Council of Borough of Oradell*, 425 U.S. 610 (1976). The sanctions Petitioner sought were akin to criminal penalties; thus, Petitioner must afford Respondents fair notice of the types of conduct which will be punished.

Respondents could not have been forewarned their conduct would subject them to quasi-criminal sanctions. Indeed, Respondents relied upon the decisions of this Court in *Schaumburg*, *Munson*, and *Riley*, as well as Illinois statutes, that they were acting within the law. Permitting the underlying action to proceed would deprive Respondents of fundamental due process protections under the Fourteenth Amendment.

A. Respondents Did Not Have Reason to Believe Their Conduct Would Subject Them to Quasi-Criminal Sanctions; There Was No "Fair Warning" in Violation of the Fourteenth Amendment.

Because Petitioner seeks punitive sanctions, akin to criminal penalties, Respondents were entitled to fair warning that their conduct could subject them to punishment.[27] Such notice

[27] By seeking the forfeiture of Respondents' compensation and a surcharge "for all proceeds, fees, and salaries paid," Petitioner seeks "payment to a sovereign as punishment for some offense." *Browning-Ferris Indus. of Vt, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989). Petitioner's purpose in seeking the forfeiture of Respondents' compensation is neither compensatory nor remedial but punitive. These remedies are meant to deter future conduct and act as retribution for the offense which Petitioner alleges to have been committed. *See, e.g., Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963) (these are the "traditional aims of punishment"). Petitioner also seeks punitive damages against Respondents. J.A. 106. This form of sanction "serve[s] punitive goals." *See Day v.*

is fundamental to the preservation of constitutional liberty in an ordered society. *See, e.g., Marks v. United States*, 430 U.S. 188 (1977).

"Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). "[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law. 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.'" *Id.* at 58, quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

Respondents believed their conduct was within the scope of First Amendment protections afforded professional fund-raisers in *Schaumburg*, *Munson*, and *Riley*. In particular, *Riley* invalidated a North Carolina statute which mandated disclosure by a professional fund-raiser of his fees in the context of a solicitation on behalf of a charity. Respondents also relied on Illinois statutes, *supra* at III.A., to conclude their solicitations were lawful.

The Complaint predicates its allegations of "fraud" on Respondents' retention of 85% of funds raised for fees and expenses.[28] Petitioner ignored *Munson's* holding, *i.e.*, that no nexus exists between the amount the fundraiser retains and the likelihood of fraud and, therefore, a state may not restrict the amount of money a charity may spend on fund raising activities which would otherwise operate as "a direct restriction on protected First Amendment activity." 467 U.S. at 967. Petitioner similarly disregards the *Riley* maxim that "the

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Woodworth, 13 How. 363, 371 (1852).

[28] *See, e.g.*, J.A. 9: ". . . in charging the fee amounts they [Respondents] charged they breached their duty and defrauded the donating public."

State's generalized interest in unilaterally imposing its notions of fairness on the fundraising contract is both constitutionally invalid and insufficiently related to a percentage-based test." 487 U.S. at 792.

Petitioner even ignores its own Solicitation for Charity Act which mandates disclosure of the amount a fund raiser retains only if requested by the person solicited. "If the professional fund raiser employs or uses a contract which provides that it will be paid or retain a certain percentage of the gross amount of each contribution or shall be paid an hourly rate for solicitation, or the contract provides the charity will receive a fixed amount or a fixed percentage of each contribution, the professional fund raiser and person soliciting shall disclose to persons being solicited the percentage amount retained or hourly rate paid to the professional fund raiser and solicitor pursuant to the contract, and the amount or the percentage to be received by the charitable organization from each contribution; if such disclosure is requested by the person solicited." 225 Ill. Comp. Stat. 460/17(b) (2000). The Complaint does not allege that Respondents failed to comply with this statute.

Petitioner asserts ". . . Defendants did not advise the donors that the campaign was being conducted pursuant to private for-profit contracts whereunder a negligible amount, or only 15%, of all funds raised would be given to VietNow and used for its charitable purpose . . . . The totality of the foregoing, including the numerous solicitations, the similar results over several years of solicitations, the consistently high level of retention of private compensation by the Defendants and their agents, the consistently low level of overall charitable use of large amounts of donations, and the *Defendants' failure to inform the donating public of the known minimal percentage of funds donated being made available for charitable use*, establishes that a willful knowing fraud was perpetrated upon the public by Defendants." (emphasis added.) J.A. 10.

Petitioner seizes upon Respondents' alleged failure to inform potential donors that they retained 85% of the funds raised as *prima facie* evidence of fraud.[29] This assertion conflicts with this Court's holding in *Riley*, *i.e.*, that fund-raisers cannot be compelled to disclose their compensation at the point of solicitation. *Riley*, 487 U.S. at 795-800.

Moreover, Petitioner ignores Section 460/17 of the Act which requires such a disclosure only if the potential donor requests such information and requires professional fundraisers to identify themselves and disclose to potential donors "that contracts and reports regarding the charity are on file with the Illinois Attorney General..." 225 Ill. Comp. Stat. 460/17 (a) (2000).[30] This disclosure affords potential donors the ability to obtain copies of fundraisers' contracts from the Illinois Attorney General which would disclose the financial arrangements between the fundraiser and its clients.

Respondents reasonably relied on *Riley* and Section 460/17 as guides to permissible conduct. Conversely, Petitioner completely failed to provide fair warning that by not disclosing to potential donors the amount retained (when such information was not requested by potential donors and, in any

[29] These allegations pervade Petitioner's complaint. For example, in ¶ 67K of the Complaint, Petitioner alleges: "The failure of [Respondents] to disclose that less than 17 percent of the contributions would be paid over to Vietnow and that more than 83 percent would be used for fund raising and other expenses, constitutes a violation of section 2 of CFDBPA [Consumer Fraud and Deceptive Business Practices Act]. . ." (J.A. 87). In ¶ 67L of the Complaint, Petitioner alleges: "the failure of [Respondents] and their agent solicitors to disclose that less than 17 percent of the contributions would be paid over to Vietnow and that more than 83 percent or more would be used for fund raising and other expenses also constitutes a violation of section 2 of the Uniform Deceptive Trade Practices Act. . ." *Id.*

[30] Petitioner does not allege that Respondents failed to provide this disclosure.

event, was readily available, if requested, from the Illinois Attorney General), Respondents had committed "fraud."

B. The Doctrine of Fair Notice Applies to Judicial Constructions.

This Court has held that retroactive application of law imposing criminal liability without fair warning will not be upheld. In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), the Court reversed trespass convictions based on an unforseen construction of a trespass statute. "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids . . . If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Id.* at 353-54. *See also*, *Rabe v. Washington*, 405 U.S. 313 (1972) (conviction under a state obscenity law reversed because it resulted from unforeseeable judicial construction.); *Douglas v. Buder*, 412 U.S. 430 (1973) (court's construction of "arrest" to include a traffic ticket in connection with probation revocation was unforeseeable and violated due process.) *See generally Rogers v. Tennessee*, 532 U.S. 451 (2001).

"The fundamental principle that the 'required criminal law must have existed when the conduct in issue occurred'. . . must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect." *Bouie v. City of Columbia*, 378 U.S. at 354.

In his dissent in *Rogers v. Tennessee*, Justice Scalia stated:

> The 'fair warning' to which *Bouie* and subsequent cases referred was not 'fair warning' that the law might be changed," but fair warning of *what constituted the crime*

> *at the time of the offense* . . . It expressed disapproval of "*judicial construction* of a criminal statute" that is "unexpected and indefensible *by reference to the law which had been expressed prior to the conduct in issue.* It thus implicitly approved only judicial construction that was an expected or defensible application of prior cases interpreting the statute. Extending this principle from statutory crimes to common-law crimes would result in the approval of retroactive holdings that accord with prior cases expounding the common law, and the disapproval of retroactive holdings that clearly depart from prior cases expounding the common law. According to *Bouie*, not just 'unexpected and indefensible' retroactive changes in the common law of crimes are bad, but *all* retroactive changes.

532 U. S. at 470.

Respondents' fundraising practices were guided by the standards of *Schaumburg*, *Munson* and *Riley*, *i.e.*, the state could not require charitable solicitors to devote a specific percentage of funds raised for charitable purposes; states could not prescribe a limit as to the percentage of funds collected which the fundraiser could retain; states could not dictate the "reasonableness" of the fee to be charged; and states could not compel charities to disclose at the point of solicitation the percentage of contributions collected during a period which was distributed to the charity.

Petitioner attempts to characterize such practices, which heretofore are consistent with this Court's established precedents, as tantamount to criminal violations without fair warning to Respondents that such conduct could be characterized as quasi-crimes. The Fourteenth Amendment proscribes this action by Petitioner.

CONCLUSION

The judgment of the Illinois Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX

Excerpts of Trial Transcript Hearing Held on
November 4, 1996

(Appendix to Appeal 16-23)

* * * *

told, "Give a hundred dollars ($100.00) to help the men and five dollars ($5.00) doesn't go to that and that is absolutely a fact. They're not aware of that.

Now, we recognize and everybody recognizes there are costs associated with fundraising. We don't get up here and put witnesses on the stand and ask this. They're going to say, "Yes." We all have to realize that that's a reality. However, people don't realize when they're answering we believe—we're contending we think we can prove that the people did not realize five percent (5%.) of their money was just given to somebody who asks for it was going to have a percent cost.

Now, how is that different from a golf outing? I think when we all go on a golf outing we know carts cost money. We know golf fees are there. Maybe we all hope that golf fees would stop and that would be a wonderful thing but I don't think I can get that. Oh, I knew it or I relied upon that and I think that's a fact. So, therefore, when we are talking about a golf outing people at least—normal people, reasonable people must assume there are high expenses associated with golf outings depending on what the fees are.

Now, if a golf outing ticket was a thousand dollars ($1,000..00), I suppose a lot of people would be surprised. It cost eight hundred dollars ($800.00) to put on a golf outing. We are not talking about that. So when we try to make it—that comment is in our brief. We were talking more like when it is a hundred dollars ($100.00) fee to go on a golf outing. Maybe it is sixty-five (65), seventy dollars ($75.00). Maybe

that's what it cost an organization. We don't know. We were suggesting those kinds of situations.

People know much the same with the dinner dance. You go to a guy's dinner dance. You are wearing your tuxedo at the Hilton Hotel. I don't mean to pick on the Hilton but it is a hotel. There is a band up there playing. There is flowers on the table. There is a meal that is prepared. We all know that cost some money. And, therefore, if we paid a hundred dollars ($100.00), we would suspect something that cost more than fifty (50), sixty (60), whatever the number might be. We might all have an imagination of what that number might be. If we paid a thousand dollars ($1,000.00) we would be surprise. You don't need an emergency motion.

Now, the federal rules require that you give a value. If, in fact, you received something back from a donation to charity today, in order for the charity to maintain its tax exemption status, it must put that information on the receipt or the materials that it hands out. But—so I mean this is what kind of disclosure that is required. But what really—when this case came down what did we need and what did we deal with here. We are dealing with the—we are not dealing with the—the solicitation act is only—

I mean there are some other parts of it we really didn't get into such as the licensing part. And I don't want to get sandbagged on our argument. I mean our licensing, if something is wrong, we let you know. We give you time to correct it. I mean there is no burden on anybody. There is no stopping anybody. They submit their paper and they're off and running. I mean if we have a problem with it, we have to let them know. How do we deal with it? There is no brief in effect that there is an abusive process. There is no proof that licensed professional fundraisers have proved to be any kind of abuse in Illinois. They turn in some papers and we move forward.

I guess as counsel points out in his brief that maybe the Attorney General has to decide whether their comments are accurate or not. But I think in all circumstances, you know, the question of whether somebody has completed the application form and done it in .a way that's accurate, ' guess, it's always imposed upon anybody who is filing some kind of license or some kind of procedure to move forward that it be complete and accurate.

Certainly, you know, we could get into the nuisances of what that means, but I don't think that we legally have a legitimate argument about an Illinois license or professional funding is a barrier to them. So I don't want to not say something about that because he didn't argue that in his oral argument.

This case comes down to a common law fraud case that we brought on the pleadings. We have alleged that they have taken eight-five percent (85%) of the money that people wouldn't give if they knew that they were professionals—they took money for charitable purposes. The statute in the common law makes them fortuitous. They collect money for charitable purposes. They have to use it properly. And in this case they took eighty-five percent (85%) and people don't know. And I think people have a right to know when you talk about a material amount of eighty-five percent (85%).

In Riley they're talking about thirty-five percent (35%). Is that material? I don't know. I guess we would with all the circumstances think thirty-five percent (35%) is material. I found a case. I didn't bother to do this in my case-in-chief, but there are a couple of cases, Ryan (phonetic) versus Adelberger (phonetic). And the case cite on this is 67 Ill. Epp. 3rd.

THE COURT: Did you give those to counsel?

MR. PERKINS: No, Judge. And the reason—Judge, all I'm saying is percentage and I made these arguments in my

brief about commercial cases. This is consumer cases. The fact is that four ounces short of twenty (20) would be considered to be a tax fraud in the commercial world. Those are percentages. They don't use the word percentage always. They use principle amount, substantial amount. Substantial seems to be a word that the courts like but it alters on materiality. It all turns *on a* concept of percentage. This isn't—a percentage is a terrible word in the concept of fraud.

Material misrepresentation conjures up substantial. And when you talk about numbers, I guess you've got to do percentage. I don't know any other way that I could use substantial. I could say it is an eighty percent (80%) substantial portion but portion percentage, they're all the same. We come to materiality. People do not know they have a right to know what the State believes.

We don't have—in Riley we have a court looking at thirty-five percent (35%). We can't guess what the court would have said at eighty-five percent (85%),. We can't guess what the court would have thought at sixty percent (60%)—over fifty percent (50%). I'm not saying that the courts would ever allow us to have a statute that would be at five percent (5%). We would have to bring the case by case.

And I don't want to belabor this too much longer, Judge, but one thing that they did say in their brief was that one of the purposes of fundraising year-to-year is to build up a donor base to have this. You collect the money one year and then next year you have people to collect from and the next year you have building and building. That's true. If you're building and building and the percentages go down, but in case the percentages are locked in—and so if you give a hundred dollars ($100.00) in 1990, eighty-five dollars ($85.00) to the fundraiser in that year. When they call you up on the phone and you gave—last year you gave, again eighty-five dollars ($85.00) goes to the fundraiser again and again and again.

There is no economy scale here. There is no building of a difference between prospecting for donors and renewals of donors that maybe justifies the start-up cost of a charity in the beginning that needs to spend extra money to get known to be —to get out there to find the people to support it. This is a rape of the people who support. You are really a sucker here if you have given year one and year—and only fifteen (15) percent of your money in fees to the charity who would give to that.

Your Honor, this is a common sense consideration. We will put on our proof that people just wouldn't give if they knew that. And that's an important material fact. Where did the money go? Now, if we were talking about twenty-five percent (25%) or thirty percent (30%), I'm not sure I could succeed with this argument. People know that there are cost. But eighty-five percent (85%) is ridiculous and there is no compelling fact in the record as we sit here with the complaint.

I wish I was arguing—I don't think I would be arguing different facts, when I am done with the proofs, but I am sitting here on my complaint and I think our complaint makes our

* * * *

Excerpt of Trial Transcript Hearing
Held on May 29, 1997
(Appendix to Appeal 532-35)

point, there are 15,000 charities registered with the Attorney General in Illinois. And, therefore, putting those on the front of the newspaper unfortunately can't be done. And, therefore—

THE COURT: How many of them are actively doing telephone solicitations at any given time? I probably get—I can tell you because I get called by all of them, it seems. You probably get two or three at night at must, which would be 15 a week.

MR. PERKINS: You know, Judge, I'd be glad—that information is there, and we're hoping to make more of it. But I don't think that's the point of our case, and Your Honor's points are well made. There's no doubt that public information is really really one of the keys to this process.

However, the Attorney General is required by the Solicitation for Charity Act to enforce its provisions. And our lawsuit cites that statute. It cites Section 9 of that statute, which states that when he believes there is a fraud or scheme to defraud in the charitable fund-raising area, he may bring an action to enjoin that and to obtain other relief.

And that's exactly what this lawsuit is brought under is that statute for conduct that we wish to enjoin and prevent.

Now, if that statute sits there with that provision in it, when would it take effect other than in a situation like this? It would take effect at 100 percent. I think we all—most of the time. I mean there are situations that we're not engaged in. In a situation, 100 percent might be appropriate.

Would 98, 97, 96? Where does the Attorney. General decide? He must employ some kind of standard that he chooses, what he believes., to be reasonable.

THE COURT: Do you agree that there are circumstances where even taking 100 percent—for example, when they're raffling a car and they don't get the cost of the car back, you circumstances where, I think, a fiduciary could justify that the cost consumed all the revenue. I would not stand here and disagree would agree that taking 100 percent would, inn fact, be okay?

MR. PERKINS: Yes, Judge. There are circumstances where, I think, a fiduciary could justify that the cost consumed all the revenue. I would not stand here and disagree.

THE COURT: Doesn't that philosophy reward the incompetent and punish the competent?

MR. PERKINS: That could be in a certain case. We would hope that if it was incompetence that consumed all of the revenue and our office was aware of the situation, we would sue the fiduciary for incompetence as well as personal greed, as we have done in this case. The difference—and maybe in this case we'll find that 85 percent is incompetence.

But the fee arrived at 85 percent is not based on expenses, Judge. It's not based on fiduciary coming to this Court and saying I properly spent the 85 percent; it was proper 'rent; it was mailings; it was postage; it was this; I spent my money properly.

What the defendants say is we agreed with another fiduciary, not with the beneficiaries. The two fiduciaries got together, for example, the executor and the attorney in an estate; and we decided that the fee would be 85 percent and we took it. And we stand and say to the beneficiaries, tough. The two fiduciaries, we talked together and we've taken 85 percent for our fee. We don't have to justify why we took that 85 percent. We d n t have o explain that it was expenses and that it's proper number because we wrote a contract between ourselves.

That's not a situation that a fiduciary should be permitted. A fiduciary doesn't get to write what his fee is and the beneficiaries are bound by it. This fiduciary told people that these millions of dollars would be used for charitable purposes. They haven't been. contends or it contends that it took the money as fees, self-imposed, self-determined. There's no proof that that's fair

The. Attorney General believes that what was told to people is untrue because 85 percent of the money did not go to help veterans. While there's obviously expenses, no one

who donated had they known that 85 percent of the money, would have gone as fee to these fiduciaries.

Therefore, they have the burden to justify that their 85 percent fee is a reasonable fee. It would be an attorney coming to a court on a contingency fee case saying I decided that my fee would be 85 percent.

We agree in this community that 33 percent is usually okay in a contingency fee case. Although, I'm sure we all are aware, there are exceptions to that rule. However, we all have a sense that 85 percent as a contingent fee would be excessive.

So there have to be concepts in which the person who—

THE COURT: I don't think Counsel would agree that 85 percent is automatically excessive.

MR. PERKINS: Judge, I agree with you. I'm not always talking that it's always because that's why in the Riley case the Supreme Court struck down statutes. They said you can't pick a percentage; you can't apply a percentage always; there are always circumstances and that the State must :choose its cases and its facts case by case.

We've chosen this case because we believe the facts here show an 85 percent taking of $5 million without justification, a $4 million charge in a situation where people were told it would benefit veterans. There's no showing that the $4 million that was kept by the defendants is a

(21)

Supreme Court, U.S.
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No. 01-1806

In the

Supreme Court of the United States

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* LISA MADIGAN, ATTORNEY GENERAL OF THE STATE OF ILLINOIS,

Petitioner,

v.

TELEMARKETING ASSOCIATES, INC., RICHARD TROIA and ARMET, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

REPLY BRIEF FOR PETITIONER

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I. Introduction

Nothing in the arguments of Respondents and the *amici* supporting them justifies the conclusion that the First Amendment categorically precludes a State from pursuing a fraud action against a professional fundraiser who solicits money by representing that it will be used for specific charitable purposes but keeps the vast majority of all donations. Respondents essentially ignore the Court's repeated statements that individual fraud actions are a valid means for government to protect its citizens from charitable solicitation fraud. Instead, in an apparent attempt to bring Illinois' claims within the reach of the Court's holdings in *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980), *Secretary of State of Maryland v. Joseph A. Munson Co.*, 467 U.S. 947 (1984), and *Riley v. National Fed'n of the Blind of North Carolina*, 487 U.S. 781 (1988), Respondents have misdescribed both those holdings and Illinois' claims.

The Court's precedents establish that a State may not prohibit all appeals for charitable contributions *solely* because the percentage of donations devoted to fundraising expenses exceeds some statutorily prescribed level. In *Riley* the Court further held that a State may not require all professional fundraisers to disclose what share of donations they have turned over to charity before asking for a contribution. 487 U.S. at 795-801. Clearly trying to fit the present case within those principles, Respondents assert that Illinois' fraud claim is based *exclusively* on the allegations that Respondents' fees were "excessive" and that they did not voluntarily disclose those fees to donors. That characterization is unsupportable. Illinois' complaint includes claims for actual fraud and alleges that Respondents told donors their contributions would be used to provide specific forms of assistance to needy veterans. *Schaumburg*, *Munson* and *Riley* do not forbid such claims, but instead affirm that they represent a valid means for a State to protect its citizens from fraudulent charitable appeals.

Respondents concede that fraudulent charitable solicitations are unprotected speech under the First Amendment. They nonetheless maintain that, for several reasons, what Illinois has alleged here does not amount to such fraud. These arguments are unconvincing. Although Respondents repeatedly assert, without elaboration, that they did not make any "affirmative misrepresentations" to donors, they make no attempt to defend the view that half-truths or other implied misrepresentations of fact for pecuniary gain are protected speech. Instead, they argue that, under this Court's holdings in *Schaumburg*, *Munson* and *Riley*, their representations to donors cannot be fraudulent because fundraising fees are "immaterial" to fraud as a matter of law and because donors knew *some* part of their donations would be used for fundraising costs. Respondents further argue that donors were not "harmed" because their contributions did support VietNow's broader charitable goals, including advocacy and the dissemination of information about veterans. The Court's precedents provide no support for these arguments. To the contrary, the Court has held that materiality is an issue to be decided on the specific facts of each particular case. See *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 445 (1976).

Respondents' other contentions likewise have no merit. Application of the well-established definition of a "misrepresentation" to deceptive statements about how charitable donations will be spent will not silence substantial amounts of protected speech, but instead will reduce the incidence of unprotected fraudulent speech and promote the type of nondeceptive charitable appeals that enhance the public's ability to make informed choices about charitable giving. To combat the evil of fraudulent charitable solicitations, States are not constitutionally compelled to forego individual fraud actions in favor of dramatically less effective alternatives, like general public education efforts and making corrective information available in government offices or on the internet. History has amply demonstrated the potential for fraudulent

practices in one-on-one communications in which the speaker has a financial stake in the outcome. Limiting government to mere half-measures against actual fraud perpetrated in the name of charity would merely invite rampant exploitation of the public's generosity without any substantial benefit to legitimate free speech interests.

II. Illinois' Complaint Alleges That Respondents Committed Actual Fraud by Misrepresenting to Donors How Their Contributions Would Be Used.

In an apparent attempt to pound a square peg into a round hole, Respondents insist that Illinois' claims are no different than those rejected in *Schaumburg*, *Munson* and *Riley*. The statutes struck down in those cases prohibited the solicitation of donations for charity based *solely* on the percentage of donations devoted to fundraising fees or administrative expenses. Illinois' claims for common law fraud and violations of its anti-fraud statutes, by contrast, include allegations that year after year Respondents "represent[ed] to donors that the funds they contributed would go to charitable purposes," when in fact almost none of these funds were used for such purposes because, throughout the entire 13-year period, Respondents' contracts entitled them to keep 85 percent or more of every donation. J.A. 86, 102, 105. The donor affidavits attached to the complaint, which the Illinois Supreme Court acknowledged, Pet. App. 6,[1] specifically listed

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[1] Respondents wrongly contend that these affidavits were not part of Illinois' complaint or properly considered in connection with their motion to dismiss. Resp. Brf at 14, n.7. This contention—which they did not advance below and which the Illinois Supreme Court never considered—is contrary to well-established Illinois law, under which attached exhibits referred to in a pleading (as here, J.A. 104) are considered part of that pleading "for all purposes." 735 Ill. Comp. Stat. 5/2-606 (2000); see also *Pure Oil Co. v. Miller-McFarlane Drilling Co.*, 376 Ill. 486, 34 N.E.2d 854, 859 (1941); 3 R. Michael, *Illinois Practice* § 23.9, at 332-33 (1989).

some of these purposes (*e.g.*, "rehabilitation services," "job training" and "food baskets" for Vietnam War veterans who were "disabled," "injured," "homeless" or "unemployed.") J.A. 107-194. These allegations clearly bring this case within the Court's statements that States may vigorously enforce their laws against fraud. *Riley*, 487 U.S. at 795, 800; *Munson*, 467 U.S. at 961 n.9; *Schaumburg*, 444 U.S. at 637 and n.11.

Remarkably, Respondents totally ignore the complaint's allegations regarding their representations to donors about how contributions would be spent. Instead, Respondents (and many *amici* supporting them) repeatedly mischaracterize Illinois' claims as being based exclusively on allegations that Respondents' fees were "excessive," and that Respondents therefore had an affirmative duty to disclose their fees to donors. Resp. Brf at i, 1, 6-7, 10- 11, 13. Having set up this "straw man" characterization, Respondents and the *amici* supporting them proceed to knock it down, arguing that government has no business regulating whether fundraising costs are "excessive"; that such costs are a meaningless concept which cannot be measured in any reliable fashion; and that requiring all charities to volunteer their fundraising fees to donors if the government considers them excessive violates the First Amendment prohibition against forced speech. These arguments, based on a misdescription of Illinois' complaint, provide no guidance on the issue actually presented to the Court. Respondents' attempts to side-step that issue are therefore unavailing.[2]

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[2] Similarly, a claim that a person induced another to enter into a financial transaction with an *implied* misrepresentation of fact, as Illinois alleged, is one for actual fraud, not constructive fraud, as *amicus* the American Teleservices Association incorrectly contends. See *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 252 (1951); W. Keeton, *et al.*, *Prosser and Keeton on The Law of Torts* § 106 at 738-39 (5th ed. 1984) ("*Prosser*").

III. Respondents' Fundraising Fee Is Not Immaterial to Whether They Committed Actual Fraud.

Respondents argue that Illinois' claim against them is constitutionally deficient because, they maintain, the Court's precedents in *Schaumburg*, *Munson* and *Riley* establish that Respondents' fees are "immaterial" to whether they defrauded donors. This argument misreads the Court's precedents. The statutes challenged in *Schaumburg*, *Munson* and *Riley* prohibited charitable solicitations based solely on the percentage of donations devoted to fundraising expenses and administrative costs *without regard to what donors were told*. The claim that expenses above the statutory ceiling were "fraudulent" thus depended on the premise "that any organization using more than [the maximum allowed] percent of its receipts on fundraising, salaries, and overhead is not a charitable, but a commercial, for-profit enterprise and that to permit it to represent itself as a charity is fraudulent." *Schaumburg*, 444 U.S. at 636; see also *Munson*, 467 U.S. at 961. The flaw in this assumption, the Court held, is that there are many legitimate reasons why a *bona fide* charity might have expenses above this level, so there is no "*necessary* connection" between high fundraising or administrative costs and fraud. *Munson*, 467 U.S. at 961 (emphasis added); see also *id.* at 966; *Riley*, 487 U.S. at 794 n.8. Illinois has no quarrel with this observation.

Respondents erroneously contend, however, that the Court went further in *Riley* and, by reaffirming its "clear holding in *Munson* that there is no *nexus* between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent," 487 U.S. at 793 (emphasis added), declared fundraising costs to be "immaterial" as a matter of law to whether *specific* representations made by a fundraiser are fraudulent. Resp. Brf at 25-26. As noted in Illinois' initial brief (at 43, n.32), such a reading of this passage in *Riley* ignores the issue before the Court, does violence to the language of the opinion, and disregards the

actual holdings in *Schaumburg* and *Munson*. Respondents' contention that fundraising costs are categorically immaterial to whether fraud occurred in a specific situation also defies logic, for if that were true a professional fundraiser would be exempt from fraud liability for affirmatively misstating his fee—a position even Respondents do not defend.

In a further leap of illogic, Respondents contend that because, as the Court noted in *Riley*, "[d]onors are . . . undoubtedly aware that solicitations incur costs, to which part of their donation might apply," 487 U.S. at 799, *any* share of donations devoted to fundraising expenses is immaterial. Resp. Brf at 43-44. A key purpose of the concept of materiality in the law of fraud, however, is to separate misrepresentations that are objectively substantial from those that are not. See, e.g., *TSC Indus.*, 426 U.S. at 445-49; Restatement (2d) of Torts § 538 and cmt. e (1977); *Prosser* § 108 at 753-54; J. Story, *Commentaries on Equity Jurisprudence* § 195 (1884). Thus, just because *some* differences in degree may be immaterial does not mean that *all* such differences are immaterial, and the understanding of donors that *some* of their contributions would be spent on fundraising costs does not automatically render non-fraudulent *any* level of such costs (including, as Respondents maintained below, 99 percent of all donations).

Respondents also claim that fundraising costs are unimportant to donors, or relevant only to those who specifically inquire about such costs. Resp. Brf at 41-43. These factual propositions are hardly self-evident. Indeed, the donor affidavits attached to the complaint directly refute them.[3] Moreover, affirmative representations to donors that their

[3] Similarly, the survey summarized in the Better Business Bureau's *amicus* brief (at 8) reveals that the information most highly desired by people who give money to charity relates to a charity's finances, and in particular the percentage of donations that go to the charity's program.

contributions will be used for specific types of assistance will naturally tend to deflect any further inquiry by reassuring them that their donations will go to those purposes rather than other ends. And when people are told their donations will be used for a charitable purpose, at some point the gap between how much they reasonably understand will be used for that purpose and the truth becomes material. There is therefore no basis for the Court to erect a rule of constitutional law that fundraising and administrative costs are *per se* immaterial to all donors except those who specifically inquire about them.[4]

Finally, Respondents maintain that fundraising costs are immaterial to whether a charitable solicitation is fraudulent, and that donors who are told their contributions will be devoted to specific charitable programs are not "harmed," because the Court has recognized that such solicitations also provide non-monetary benefits, like "public education and advocacy for a cause." Resp. Brf at 8-9, 26-27 and n.15, 43-44. As *amici* Thirty-Two Commercial Fundraisers and Fundraising Consultants put it (*Amicus* Brf at 2): "[D]onors . . . were offered an opportunity to help advance VietNow's charitable mission and that is precisely what they got." This argument ignores what donors were actually told and misreads the Court's precedents.

As noted above (at 5), the justification offered for the

[4] Illinois law does not support Respondents' contention—which they also did not raise below and the Illinois Supreme Court never considered—that Section 460/17 of Illinois' Solicitation for Charity Act, 225 Ill. Comp. Stat. 460/17 (2000), requiring professional fundraisers if specifically asked to disclose the amount of donations they respectively keep and turn over to the charity, impliedly repeals the common law of fraud to the extent it prohibits deceptive half-truths about the use of donations. See, e.g., *Acme Fireworks Corp. v. Bibb*, 6 Ill. 2d 112, 119, 126 N.E.2d 688, 691 (1955); *Reeves v. Eckles*, 77 Ill. App. 2d 408, 410, 222 N.E.2d 530, 531 (1966).

statutes in *Schaumburg*, *Munson* and *Riley* was that expenses above a certain level demonstrated that an organization soliciting donations was not a legitimate charity at all, but instead a for-profit enterprise masquerading as a charity. This premise was flawed, the Court held, because *bona fide* charities may have expenses above the statutory ceiling for a number of legitimate reasons, including that they or paid fundraisers acting on their behalf engage in public advocacy or education efforts. See, e.g., *Riley*, 487 U.S. at 798-99. The existence of such "mixed" messages as part of many charitable appeals was accordingly a proper reason to invalidate blanket rules treating *all charities* with fundraising expenses above a statutorily fixed level as illegitimate. It does not follow, however, that the mere possibility of such education or advocacy efforts, however small, makes fundraising fees *per se* immaterial to whether a *particular solicitation* is fraudulent. Illinois' complaint alleges that Respondents told donors their contributions would be used to provide specific types of assistance to needy veterans. If, as the complaint further alleges, those representations were false and misleading, they are not less so because VietNow or Respondents devoted some resources to other charitable purposes.[5]

IV. Individual Fraud Actions Like This One Represent a Narrowly Tailored Means to Prevent Fraudulent Charitable Solicitations.

The Court was correct when it stated that individual fraud actions constitute a valid means for government to prevent charitable solicitation fraud. *Riley*, 487 U.S. at 795,

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[5] Even representations to donors that contributions will be used for public education or advocacy can be fraudulent if only a token amount is devoted to those purposes. Like the merits of Illinois' claim here, such issues should be decided in the context of individual cases, not by a blanket rule that such representations can never be the subject of a fraud claim.

800; *Munson*, 467 U.S. at 961 n.9; *Schaumburg*, 444 U.S. at 637 and n.11. It should reaffirm that principle here. In opposition to this conclusion, Respondents contend that fraud claims like this one are a form of content-based regulation of speech and, as such, are valid only if they further a "compelling" governmental interest by the "least restrictive means." Resp. Brf at 24, citing *Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115 (1989). But that test applies to laws that regulate the content of "constitutionally *protected* speech" in order to accomplish another objective, *Sable*, 492 U.S. at 126 (emphasis added), not laws that directly prohibit *unprotected* speech, which instead are governed by the requirement that they further a "substantial" governmental interest by "narrowly tailored means." *Riley* 487 U.S. at 792; see also *Munson*, 467 at 960-61; *Schaumburg*, 444 U.S. at 637; see generally *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994); *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 476-81 (1989).[6] The relevant inquiry, therefore, is not whether Illinois law represents the least restrictive means for preventing fraud, but whether this objective would be "achieved *less effectively* absent the [law]," and the law does not "burden substantially more speech than

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[6] Such a standard for laws that expressly prohibit unprotected speech makes practical sense. Where a law regulates *protected* speech, the least restrictive means requirement helps ensure that government's articulated goal is not actually a pretext for suppressing particular views or ideas. See *Burson v. Freeman*, 504 U.S. 191, 212-13 (1992) (Kennedy, J., concurring). That concern is absent where a law specifically targets one of the few categories of speech that may be prohibited *because of its unprotected content* and is, by its terms, limited to the source of the evil sought to be proscribed. The core requirement of "narrow tailoring" and the rule against viewpoint discrimination (see below at 18) provide ample assurance that such laws neither sweep too broadly, by prohibiting a substantial amount of protected speech, nor focus too narrowly, by singling out particular ideas for suppression.

necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (emphasis added); see also *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, ___, 122 S. Ct. 1389, 1404 (2002).

By prohibiting factual misrepresentations for pecuniary gain, Illinois common law and anti-fraud statutes directly target unprotected speech and reach no farther than necessary to achieve that goal. They are not, like the statutes in *Schaumburg*, *Munson* and *Riley*, "aimed at something else in the hope that [they will] sweep fraud in during the process." *Munson*, 467 U.S. at 969-70. By focusing precisely only on actual fraud, such laws are, as the Court indicated, a constitutionally valid means to accomplish this goal. *Riley*, 487 U.S. at 795, 800; *Munson*, 467 U.S. at 961 n.9; *Schaumburg*, 444 U.S. at 637 and n.11.

Respondents profess to embrace the view that less restrictive means for government to combat fraudulent charitable solicitations include "prosecution for fraud." Resp. Brf at 9, 28. They never explain, however, why they believe this case does not fit within that category. And while they repeatedly assert—incorrectly—that Illinois does not allege they made any "affirmative misrepresentations," *id.* at 1, 9, they make no attempt to defend the notion that implied misrepresentations by charitable solicitors are entitled to categorical First Amendment immunity. As Illinois' opening brief demonstrates (at 15-23), that notion is indefensible.

The alternative means to prevent fraud proposed by Respondents and the *amici* supporting them—*e.g.*, greater government efforts at public education and making charities' financial information available in public offices or on the internet—cannot possibly compare in effectiveness with a law proscribing actual fraud. Such alternatives thus do not undermine the constitutionality of Illinois' common law and anti-fraud statutes as applied to deceptive charitable solicitations. Cf. *Nixon v. Shrink Missouri Government PAC*, 528

U.S. 377, 395-96 and n.7 (2000) (upholding campaign contribution limits as a means to prevent actual and apparent corruption because they "focu[s] precisely on the problem" sought to be addressed, whereas the proposed "less restrictive mechanisms" of "disclosure requirements and bribery laws" represent less effective "partial measure[s]").

Personal solicitations for an immediate charitable donation entail a well-recognized danger of fraud, especially for the most vulnerable members of the public. See, e.g., *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 705-06 (1992) (Kennedy, J., concurring) ("requests for immediate payment of money create a strong potential for fraud or undue pressure, in part because of the lack of time for reflection"); cf. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464 (1978) (noting that in-person solicitation of accident victims by lawyers for pecuniary gain is "inherently conducive to overreaching and other forms of misconduct").[7] It is not a sufficient response to such dangers that the most astute and skeptical among us could, by researching public records or locating information available on the internet, eventually correct a false impression created by a solicitor pressing for an immediate gift or pledge of money. For large segments of the population, such cumbersome and untimely measures would be no match for unscrupulous charitable solicitors if, as Respondents advocate, they were given First Amendment immunity to obtain donations with "implied" misrepresentations about how that money will be spent. See Restatement (2d) of Torts § 540 cmt. b ("The recording acts are not intended as a protection for fraudulent liars"); *Prosser* § 108 at 752; cf. *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 392 (1992) (rejecting system of regulating expression which

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[7] AARP's *amicus* brief (at 7-14) highlights the danger to many elderly citizens and other vulnerable segments of society from the essentially unregulated environment Respondents advocate.

authorizes "one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules"). And while a substantial portion of the population now has access to the internet and many individuals could eventually figure out how to obtain information on how a charity spends its funds, the intended—and frequently successful—effect of a misrepresentation about such expenditures is often to give the listener a false sense of confidence and discourage him or her from any further inquiry.[8] The only adequate weapons against such fraud are laws specifically prohibiting it.

Respondents dispute that Illinois' laws invoked in this case give fundraisers "fair notice" of what is prohibited. Indeed, they claim that these laws are so vague as to violate the substantive due process requirement of the Fourteenth Amendment (and, presumably, that similar federal laws violate the Fifth Amendment). If that were true, however, the entire body of civil and criminal law relating to fraud and false pretenses, including mail and wire fraud, would be void. There may be hypothetical situations in which the long-established definition of a "misrepresentation" is so uncertain as to raise constitutional concerns, but this case is not one of them, and the possibility of such concerns in other cases does not warrant invalidating long-established fraud principles for all charitable solicitations. See *National Endowment for the Arts v. Finley*, 524 U.S. 569, 584 (1998) (noting the Court's reluctance "to invalidate [a law] 'on the basis of its hypothetical application to situations not before the Court'") (quoting *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 743 (1978)); see also *id.* at 587; *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973).

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[8] The survey described in the Better Business Bureau's *amicus* brief (at 8) points out, though, that close to half of donors say it is difficult to obtain financial information on charities, and that the elderly are more likely to be frustrated in their search for such information. Moreover, if such information is relevant if available elsewhere, it cannot be immaterial when the solicitation is made.

Ultimately, Respondents' position advocates a "Catch 22" under which almost no law prohibiting charitable solicitation fraud is constitutional. On the one hand they insist that "[c]harities need uniform, consistent and specific advance notice of what is prohibited," Resp. Brf at 7-8; yet on the other hand they argue that, under this Court's precedents, any "bright line" rule is unconstitutionally overbroad. This is a false choice. Existing fraud principles, combined with traditional procedural protections where First Amendment interests are implicated (see Pet'r Brf at 24-27), adequately guard against the type of unfair surprise prohibited by the Constitution.

The well-established definition of a "misrepresentation," along with the normal procedural safeguards for claims that particular speech is unlawful, likewise refute the contention that "chilling" principles (to the extent they apply, see Pet'r Brf at 36, n.26) categorically preclude claims of charitable solicitation fraud based on half-truths or other implied misrepresentations about how charitable donations will be spent. Respondents and several *amici* emphasize that there is no perfect, universally accepted formula for measuring fundraising costs as a percentage of charitable donations. This observation—which seems designed to topple the straw man argument that Illinois' claim merely challenges the reasonableness of how donations to VietNow are spent—misses the mark. Respondents allegedly misrepresented that donations would be used to provide specific forms of assistance to needy veterans, and such representations are verifiably true or false based on the share of donations actually used for such assistance regardless of any possible debate about the best way to measure fundraising costs.

Respondents alternatively suggest that they are not mind readers and cannot know with certainty whether donors will understand their representations to mean something that is factually untrue. This concern does not justify depriving

government of any ability to pursue fraud claims like the one here. See *Broadrick*, 413 U.S. at 608; *Grayned v. City of Rockford*, 408 U.S. 104, 108-11 and n.15 (1972); cf. *Finley*, 524 U.S. at 584. There is no basis for fundraisers generally, or Respondents in particular, to complain they are unable to know how the charitable donations they raise are spent. Cf. *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 564 n.6 (1980); *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976). Any objection is thus limited to a solicitor's ability to anticipate with certainty how specific representations will be understood. This objection is overstated for several reasons.

The law treats as misrepresentations only words or actions whose allegedly false meaning is "reasonable" in light of the surrounding circumstances, and it is the courts' duty to enforce this limitation. See Pet'r Brf at 17-18. Thus, the mere fact that some donors may attribute a particular meaning to a solicitor's statements is not enough for those statements to qualify as misrepresentations. Cf. *Union Carbide Corp. v. Ever-Ready Inc.*, 531 F.2d 366, 383 (7th Cir. 1976) (noting that, under trademark law, "isolated instances of actual confusion . . . have been held insufficient to sustain a finding of likelihood of confusion"). Further, the solicitor, as the source of the representations, has a unique ability to control his message and the meaning it conveys. Cf. *TSC Indus.*, 426 U.S. at 448 (noting that "the content of the proxy statement is within management's control"). And to the extent language is subject to some irreducible indefiniteness, see *Grayned*, 408 U.S. at 110; *Arnett v. Kennedy*, 416 U.S. 134, 161-64 (1974); *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.), rules prohibiting deceptive speech are more likely to encourage accurate and nonmisleading statements by charitable solicitors than to produce silence. Cf. *Virginia Pharmacy Bd.*, 425 U.S. at 771 n.24. This difference is important because the interests of fundraisers, as "speakers,"

cannot be elevated to the point that they effectively nullify the interest of donors, as "listeners," in information that helps them make informed choices about charitable giving—a goal that laws against fraud validly promote. See *Schaumburg*, 444 U.S. at 637-38.

The significance of any chilling effect is also reduced by the nature of the expression allegedly chilled. As Illinois noted in its initial brief (at 37-38), Respondents' alleged misrepresentation involved how donations would be used, not some matter of general public concern. The potential harm to protected speech is accordingly greatly mitigated. Cf. *United States v. National Treasury Employees Union*, 513 U.S. 454, 465-66 (1995) (noting First Amendment distinction between government employee speech on private matters and matters of public importance); but cf. *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 45 P.3d 243 (2002) (finding a company's statements on matters of public debate to be commercial speech subject to less protection), *cert. granted* ___ U.S. ___, 123 S. Ct. 817 (2003).[9]

Existing limitations on fraud claims further minimize the risk that substantial amounts of protected expression will be deterred. Illinois, like many other jurisdictions, requires a claim of common law or statutory fraud to be alleged with specificity, thereby reducing the likelihood that claims for non-actionable representations will proceed.[10] The materiality

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[9] The line beyond which the First Amendment would preclude liability for charitable solicitation fraud might well be higher if liability was premised on statements of fact regarding matters of public concern. See also below at n.11.

[10] See *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 419, 775 N.E.2d 951, 961 (2002); *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482, 496-97, 501, 675 N.E.2d 584, 591, 593 (1996); see also Fed. R. Civ. P. 9(b); *Clark v. Olson*, 726 S.W.2d 718, (Mo. 1987). Respondents never objected to the complaint on this ground below.

element, which imposes an objective standard subject to judicial control, also limits the scope of potential claims. Where fraud is based on an allegedly deceptive half-truth, liability arises only if what is undisclosed constitutes a material fact, which is determined based on the individual circumstances of the particular case. See *TSC Industries*, 426 U.S. at 445; Restatement (2d) of Torts § 538 cmt. e; 37 C.J.S. *Fraud* §§ 19, 21, 24 (1997); 1 *A Treatise on the Law of Fraud on the Civil Side*, 474-76, 503-04 (1884) ("*Bigelow*"). Finally, the procedural requirements normally imposed under the First Amendment—*e.g.*, placing the burden of proof on the party seeking to impose liability on particular speech, allowing such claims only after the speech has occurred, and independent judicial review—further reduce the risk that legitimate speech will steer a wide berth around what is unprotected.[11]

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[11] Although *amicus* the United States argues that charitable solicitation fraud claims which include an allegation of knowing falsity avoid any possible chilling concerns, the Court should not hold in this case that such an element is required in *all* charitable solicitation fraud actions. First, Illinois clearly alleged that Respondents acted with knowledge of the falsity of their representations; Respondents never contested the constitutional sufficiency of the allegations regarding their intent; and the Illinois courts never addressed that issue. Second, the common law of misrepresentation, based on years of judicial experience, treats the defendant's state of mind as relevant to a host of issues. These include whether a statement constitutes a "misrepresentation" (*e.g.*, predictions and promises are "false" only if the defendant when making them has reason to know they will not be fulfilled, Restatement (2d) of Torts §§ 525 cmt. f, 530; *Prosser* § 109 at 762-65; *Bigelow* at 474-76, 483-86), and what remedies are available (*e.g.*, whereas recovery of compensatory damages requires knowledge of falsity, substantial doubts as to the truth, or the absence of any belief one way or the other, *Cooper v. Schlesinger*, 111 U.S. 148, 152-55 (1884); Restatement (2d) of Torts § 526; *Prosser* § 107 at 740-42, even an innocent misrepresentation generally suffices to obtain rescission of a contract or gift, Restatement (First) of Restitution §§ 26, 28 and cmt. a (1937); *Prosser* § 105 at 729; G. Palmer, *The Law of Restitution* § 3.19 1978); F. James, Jr. and O. Gray, *Misrepresentation —Part II*, 37 Md. L. Rev. 488, 537 (1978); *Bigelow* at 410-15, 520; see generally *Securities and Exchange Comm'n v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191-95 (1963)). Given these refinements and the Court's prior holding that even negligence is enough to sustain defamation liability by a private plaintiff on matters of *public concern*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-47 (1974), there is no reason to impose a constitutional requirement of "actual malice" for *every* form of liability by charitable solicitors who misrepresent the use of donations.

Balanced against any such chilling effect, of course, is the danger that restricting fraud liability as advocated by Respondents will effectively cripple government's ability to protect its citizens from truly harmful deceptive practices. This is clearly illustrated by Respondents' insistence below that, under their view of the First Amendment, they could have no liability for the representations they made even if they kept *99 percent* of the donations they induced people to make with these representations. See Pet'r Brf at 16. The most effective way—indeed the only truly effective way—to redress that evil is by individual fraud actions like this one.[12]

V. Illinois' Anti-Fraud Laws Do Not Have the Impermissible Purpose or Effect of Discriminating Against the Expression of Particular Charities.

Respondents also contend that allowing the pursuit of fraud claims like this one violates the First Amendment

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[12] Notably, many of the charities and other *amici* supporting Respondents approve of actions against charities or fundraisers who commit actual fraud, including by implied misrepresentations about how donations will be used, and they condemn how such fraud tarnishes the public's view of philanthropy generally. See, e.g., Brf of Public Citizen, Inc. at 4-5, 27; Brf of Ass'n of Fundraising Professionals at 2.

because doing so will burden small or unpopular charities and invite discriminatory enforcement against charities whose views the government disfavors. These arguments also fail.

Respondents apparently concede that Illinois' generally applicable anti-fraud laws do not discriminate on their face against any particular viewpoint. Rather, they suggest that permitting claims like the one asserted here will have the impermissible *effect* of burdening unpopular and newly formed charities most heavily. See *Turner*, 512 U.S. at 642-43; cf. *Finley*, 524 U.S. at 586-87. This suggestion proceeds from a mistaken assumption about basic First Amendment principles. The core principle of neutrality protects speakers from laws intended to suppress or disadvantage their particular ideas or views, but at the same time it entitles no speaker to special privileges over others. See *R.A.V.*, 505 U.S. at 386 ("The government may not regulate [speech] based on hostility—*or favoritism*—towards the underlying message expressed") (emphasis added). Any *bona fide* charity therefore has the right to seek financial support from the public; but no charity—regardless of how unpopular its cause or how recently it was formed—has the right to solicit donations by deceptive means. The fundamental purpose of the First Amendment is to safeguard robust competition in the marketplace of ideas, not to subsidize unpopular views to ensure their survival.[13]

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[13] So-called "donor acquisition campaigns" are no exception. That generating a base of repeat donors may entail substantial up-front costs does not justify representations that mislead donors about the nature of the charity or how it spends donations. *Amicus* Disabled American Veterans' suggestion that recurring campaigns of this type by established charities could be deemed fraudulent is based on the artificial premise that new donors should be "viewed in isolation" from other donors and grouped only with persons solicited for the first time, including all those who made no donation. DAV Brf at 6. Moreover, where a charity's alleged fraud consists of a false

The Court's decisions in *Schaumburg*, *Munson* and *Riley* do not support a contrary conclusion. As noted above, the Court in those cases held that blanket limits on fundraising expenses cannot be justified on the assumption that no organization exceeding those limits is a legitimate charity. In support of this conclusion, the Court in *Munson* and *Riley* noted that there are myriad reasons why legitimate charities, and especially small or unpopular ones, would have expenses above the blanket percentage rate limitation set by such statutes. *Riley*, 487 U.S. at 794; *Munson*, 467 U.S. at 967. Such reasons would directly negate the justification offered for declaring these charities "fraudulent," *i.e.*, not legitimate charities at all. The same reasons do not, however, negate a claim of *specific fraud* based on allegations that the charity or outside fundraiser obtained donations through factual misrepresentations. That a charity is unpopular or newly established (neither of which is true here) does not provide a constitutional shield against liability for obtaining funds through specific acts of deception, including misrepresentations about how those funds will be spent. The great diversity among charities also counsels in favor of the fact-specific approach taken under traditional fraud principles, as donors are likely to know that unpopular or newly-formed charities, or ones whose mission is largely public education or advocacy, will devote a lower share of donations to assistance programs.

Nor is there any basis for Respondents' suggestion that Illinois' action is motivated by an unconstitutional "hostility" toward them or VietNow. Resp. Brf at 13, 25, 26, 30. The

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promise or prediction, a necessary element is that the defendant lacked a good faith belief that his promise or prediction would be fulfilled. (See Pet'r Brf at 19; see also above at 16 n.11.) Thus, if a fundraiser is accused of misrepresenting that a charity will devote substantial funds to particular charitable activities, evidence that the fundraiser in good faith expected the charity to do so would be relevant to this issue. See *Prosser* § 109 at 764.

record in this case, in which Respondents never even filed an answer, contains nothing to support the accusation that Illinois brought this suit for any reason other than their deceptive representations to donors about how contributions would be spent; it certainly does not support the extraordinary showing needed to sustain a claim of unlawful selective prosecution. See *Wayte v. United States*, 470 U.S. 598, 608 (1985).

VI. The General Prohibition Against Compelled Speech Does Not Give a Person the Right to Make Deceptive Statements for the Purpose of Obtaining Donations to Charity.

There is, finally, no substance to Respondents' claim that prohibiting deceptive half-truths about how charitable donations will be used is legally equivalent to the compelled disclosures struck down in *Riley*. As the courts have repeatedly acknowledged, fraud can be perpetrated just as much by selective statements that are literally "true" as by ones that constitute explicit falsehoods. See Pet'r Brf at 15-21. The law of fraud thus provides that "if the defendant does speak, he must disclose enough to prevent his words from being misleading." *Prosser* § 106 at 738; see also F. James, Jr. and O. Gray, *Misrepresentation–Part II*, 37 Md. L. Rev. at 523-26. Nothing in the First Amendment precludes the straightforward application of this principle to charitable appeals. The representation that a charity will use a donation for a particular purpose is actionable fraud when the intentionally undisclosed amount actually devoted to that purpose materially differs from what the donor is reasonably led to believe. The notion that a party may utter a deceptive half-truth and then hide behind the First Amendment's general ban on forced speech is specious.

CONCLUSION

The judgment of the Illinois Supreme Court should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

JAMES E. RYAN, ATTORNEY GENERAL OF ILLINOIS,
PETITIONER

v.

TELEMARKETING ASSOCIATES, INC., ET AL.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the First Amendment precludes a State from pursuing a fraud action against a professional fundraiser who intentionally misleads potential donors by misrepresenting how charitable donations will be used.

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In the Supreme Court of the United States

No. 01-1806

JAMES E. RYAN, ATTORNEY GENERAL OF ILLINOIS,
PETITIONER

v.

TELEMARKETING ASSOCIATES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION

This case concerns the extent to which the First Amendment limits the government's authority to curtail fraudulent solicitations of charitable contributions. The United States has a substantial interest in that issue. The United States prosecutes fraudulent charitable solicitation under its criminal antifraud statutes. See, *e.g.*, 18 U.S.C. 1341 (mail fraud); 18 U.S.C. 1343 (wire fraud). Defendants convicted of those offenses in connection with telemarketing to solicit charitable donations are subject to enhanced penalties. See 18 U.S.C. 2325 (as amended by Pub. L. No. 107-56, § 1011(d), 115 Stat. 396); 18 U.S.C. 2326. The Federal Trade Commission (FTC) seeks civil redress for fraudulent charitable

fundraising under the FTC Act, 15 U.S.C. 45, which prohibits "unfair or deceptive acts or practices in or affecting commerce," and the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6102, which requires the FTC to prescribe rules prohibiting deceptive or abusive telemarketing acts or practices, including those involving charitable solicitation. 15 U.S.C. 6106(4) (as amended by Pub. L. No. 107-56, § 1011(b)(3), 115 Stat. 396). Those rules prohibit the misrepresentation "directly or indirectly" of "the purpose for which any charitable contribution will be used" or "the percentage or amount of any charitable contribution that will go to a charitable organization or to any particular charitable program after any administrative or fundraising expenses are deducted." 16 C.F.R. 310.3(d)(3) and (4) (approved Dec. 13, 2002) *available at* <http://www.ftc.gov/os/ 2002/12/tsrfinal rule.pdf>.

STATEMENT

1. Respondents Telemarketing Associates, Inc., and Armet, Inc., are professional, for-profit fundraising corporations incorporated in Illinois. Amended Complaint (Am. Compl.) ¶¶ 2, 5, 22, 24. Respondents were retained by VietNow National Headquarters (VietNow), a charitable non-profit corporation, to solicit charitable contributions to aid Vietnam veterans. *Id.* ¶¶ 8-10. Their agreements with VietNow provided that respondents would retain 85% of the gross receipts from donors within Illinois, leaving VietNow with 15%. *Id.* ¶ 11, Group Exh. B. Respondents also brokered fundraising contracts between VietNow and third-party fundraisers in other States, under which those third parties retained 70% to 80% of gross receipts from donors outside of Illinois, respondents received 10% to 20% as a "finder" fee, and VietNow received 10%. *Id.* ¶ 12, Group Exh. C. Between 1987 and 1995, respondents collected $7.1 million from persons wishing to support VietNow's charitable activities and distributed approximately $1.1 million

(slightly less than 15%) to VietNow. *Id.* ¶¶ 10, 48. VietNow allegedly spent only about three percent of the gross amounts collected by respondents to provide charitable services to veterans. Pet. 2 & n.1.

In 1991, the Attorney General of Illinois filed a state court lawsuit against respondents that asserts common law and statutory claims for fraud and breach of fiduciary duty. Pet. App. 3-4.[1] Among other things, the amended complaint alleges that respondents engaged in fraud by intentionally misleading potential donors about the uses to which their donations would be put. More specifically, the complaint alleges that respondents "made telephone solicitations on behalf of Vietnow" in which they "represent[ed] to members of the public that the funds donated would go to further Vietnow's charitable purposes." Am. Compl. ¶ 29; see *id.* ¶ 63. Donors were told contributions would be used to help Vietnam War and other veterans, including the homeless and those suffering from combat-related injuries and illnesses.[2] They were specifically told contributions would be used to provide direct assistance, including job training, rehabilitation, food, and assistance with rent and other bills.[3]

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[1] In addition to common law fraud and breach of fiduciary duty, the amended complaint alleges violations of the Illinois Solicitation for Charity Act (formerly the Charitable Solicitation Act), 225 Ill. Comp. Stat. Ann. 460/1 (West 1998); the Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. Ann. 505/1 (West 1999); and the Uniform Deceptive Trade Practices Act, 815 Ill. Comp. Stat. Ann. 510/1 (West 1999). See Am. Compl. ¶¶ 1, 23, 51-52, 56, 58-59, 76.

[2] See, *e.g.*, Am. Compl. Group Exh. H at C000327 ("Vietnam veterans in need"); *id.* at C000332 ("Vietnam veterans who were injured"); *id.* at C000333 ("Vietnam vets suffering from 'Agent Orange' "); *id.* at C000336 ("other veterans such as the homeless").

[3] See, *e.g.*, Am. Compl. Group Exh. H at C000331 (contributions to be used for providing "support[,] both physical and mental[,] as well as legal matters"); *id.* at C000339 ("food baskets, bills and rent to help physically and mentally disabled Vietnam vets and their families"); *id.* at C000340

Written materials stated that "[a] substantial portion of the proceeds will be spent on the cost of the public awareness campaign and our program service," which was described as including "Agent Orange Victim Support," "Drug/Alcohol Treatment," and "Job Training." *Id.* ¶ 30, Exh. F. In at least one instance, a donor "specifically asked" what percentage of her contribution would be used for fundraising expenses "and was told 90% or more goes to the vets." *Id.* Group Exh. H at C000358.

The complaint further alleges that respondents "did not advise donors that the campaign was being conducted pursuant to private for-profit contracts whereunder a negligible amount, or only 15%, of all funds raised would be given to Vietnow and used for its charitable purpose." Am. Compl. ¶ 37. One donor was told that her donation would not be used for "labor expenses" because "all members are volunteers." *Id.* Group Exh. H at C000329.

Based on those allegations, the complaint charges that respondents "have engaged in a course and scheme of conduct whereby representations were made that a significant amount of each dollar donated would be paid over to Vietnow for its [charitable] purposes while in fact [respondents] knew that under the contracts 15 cents or less of each dollar would be available to Vietnow for its purposes." Am. Compl. ¶ 34. The complaint also charges that, because "the amount of funds being paid over to charity was merely incidental to the fund raising effort," respondents' representations "were knowingly deceptive and materially false and were made for the private pecuniary benefit of [respondents] and their agents." *Id.* ¶ 35. See *id.* ¶ 38.

(helping "Viet. vets in Du Page [County] find jobs [and] get on their feet"); *id.* at C000346 ("job training etc."); *id.* at C000355 ("food and homeless and general assistance"); *id.* at C000358 ("rehabilitation and other services for Vietnam vets").

The complaint alleges that respondents made those false representations with the purpose of inducing members of the public to make contributions that would be largely retained by respondents. Am. Compl. ¶¶ 35, 60, 77. The complaint further alleges that donors in fact relied on respondents' misrepresentations and that, had they known how much of their donations would go to profit respondents and how little would go to support VietNow's direct assistance programs, they would not have contributed. *Id.* ¶¶ 60, 64, 74, Group Exh. H.

2. Respondents filed a motion to dismiss the complaint in which they argued that the fraud claims against them were barred by the First Amendment. Pet. App. 3. The trial court granted the motion, and the Illinois Appellate Court affirmed the dismissal. *Id.* at 19-29. The Supreme Court of Illinois affirmed the judgment of the intermediate court. *Id.* at 1-17.

The Illinois Supreme Court sought guidance from a trilogy of this Court's decisions addressing the relationship between charitable fundraising and the First Amendment: *Village of Schaumberg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980), *Secretary of State* v. *Joseph H. Munson Co.*, 467 U.S. 947 (1984), and *Riley* v. *National Federation of the Blind for North Carolina, Inc.*, 487 U.S. 781 (1988). Those cases invalidated prophylactic state and local laws that categorically prohibited charitable organizations and professional fundraisers who retained high percentages of donated funds from engaging in charitable solicitation. See Pet. App. 6-11. In addition, *Riley* invalidated a related provision that imposed a duty on all professional fundraisers to disclose, at the outset of a fundraising appeal, the average percentage of receipts that they turned over to charities during the previous year. See 487 U.S. at 786 & n.3, 795-801.

The Illinois court concluded that "the Attorney General's complaint operates to limit [respondents'] ability to engage

in solicitation * * * in a manner found constitutionally impermissible by [this] Court in *Schaumberg*, *Munson*, and *Riley*." Pet. App. 13. The Illinois court recognized that the complaint alleges that respondents' representations about the intended use of donated funds were intentionally false. *Id.* at 12-13. The court reasoned, however, that, because the falsity of the representations depends on the fact that respondents retained 85% of gross receipts, the complaint "is, in essence, an attempt to regulate [respondents'] ability to engage in a protected activity based upon a percentage-rate limitation." *Id.* at 13. In the court's view, "[t]his is the same regulatory principle that was rejected in *Schaumberg*, *Munson*, and *Riley*." *Ibid.* The court further reasoned that, under *Riley*, "fraud cannot be defined in such a way that it places on solicitors the affirmative duty to disclose to potential donors, at the point of solicitation, the net proceeds to be returned to the charity." *Id.* at 15. Finally, the court reasoned that, if petitioner were allowed to pursue these fraud claims, "all fund-raisers in this state would have the burden of defending the reasonableness of their fees, on a case-by-case basis, whenever in the Attorney General's judgment the public was being deceived * * * because the fund-raiser's fee was too high"–a prospect that "could produce a substantial chilling effect on protected speech." *Id.* at 16. The court therefore held that "the Attorney General's complaint is prohibited under first amendment principles and was properly dismissed." *Id.* at 17.

SUMMARY OF ARGUMENT

The First Amendment does not preclude the government from prohibiting fraud or prosecuting those who intentionally deceive others for monetary gain. Intentional lies distort, rather than contribute to, the marketplace of ideas, and any value they have is outweighed by society's interest in protecting those harmed by deception. It has therefore been settled, for more than 60 years, that those who extract

money through fraudulent misrepresentations are not shielded by the First Amendment–even though their misrepresentations are speech and even if they solicit in the name of charitable causes. See, *e.g.*, *Schneider* v. *State*, 308 U.S. 147, 164 (1939).

The First Amendment and prohibitions on fraud have coexisted comfortably for more than 200 years not only because fraudulent speech is itself unprotected but because the essential elements of fraud also provide sufficient breathing room for legitimate speech, including charitable solicitation. Most significant, a fundraiser may not be held liable for fraud unless it is proven that he knew or believed that his representations were false or that he acted with reckless disregard for their truth or falsity. In the libel context, essentially the same standard has been held to provide sufficient breathing room for protected speech. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 280 (1964). In a fraud action, the government must also prove that the fundraiser intended for the donating public to rely on his misrepresentations and that donors' reliance was justifiable because the misrepresentations were material. Some jurisdictions also require that fraud be alleged with particularity or that it be proved by clear and convincing evidence. To the extent that additional protection for protected speech might be necessary, special procedural mechanisms, such as independent appellate review, could provide that protection without distorting or displacing the substantive state law of fraud.

The Illinois Supreme Court lost sight of the fact that the First Amendment and prohibitions on fraud are not inconsistent. Instead, that court mistakenly held that the First Amendment creates a special immunity for fundraisers who make fraudulent representations. But prohibitions on fraud always affect speech, and there is no reason for a special immunity in the charitable solicitation context. The State's

complaint alleges that respondents intentionally misled donors by creating the false impression that a significant amount of donated funds would go to direct assistance programs operated by VietNow. The complaint also alleges that respondents intentionally created a false impression that the fundraising effort was not being undertaken for profit. Those misrepresentations are typical of the charitable solicitation frauds that the federal government prosecutes both civilly and criminally. The government's cases have involved fundraisers who collected millions of dollars for charitable programs that received only a few thousand; who collected money in a charity's name when they intended to pay the charity a fixed amount regardless of how much they raised; and who formed charities for the very purpose of carrying out fraudulent solicitation. If affirmed by this Court, the ruling of the Illinois Supreme Court would seriously impair the government's ability to prosecute such frauds and thereby to protect and to promote legitimate charitable solicitation.

The state court mistakenly concluded that this Court's decisions in *Schaumberg*, *Munson*, and *Riley* somehow preclude fraud claims based on misrepresentations of the percentage of collected funds that will go to charity or of the particular charitable purposes on which donations will be spent. *Schaumberg*, *Munson*, and *Riley* invalidated state laws that categorically prohibited solicitation by charities or fundraisers who devoted a high percentage of funds raised to administrative or fundraising costs regardless of whether those solicitors were open, silent, or deceptive about the percentage that went to charitable purposes. Nothing in those cases suggests that a misrepresentation about the percentage of donations that will go to charity cannot be the basis for a fraud prosecution. The cases hold only that the government cannot rely on that percentage to obviate the need to prosecute and to prove actual fraud. The percentage

limitations in *Schaumberg*, *Munson*, and *Riley* violated the First Amendment because they prohibited perfectly truthful charitable solicitation when fundraising costs were judged too high. Here, respondents are free to solicit even if they retain a high percentage of contributions, provided they do not intentionally mislead donors about how contributions will be used.

The Illinois Supreme Court also erred in concluding that *Riley* precludes fraud claims based on implied misrepresentations about how charitable donations will be used. The law of fraud does not distinguish between one who intentionally misleads through explicit falsehoods and one who does so through half-truths or ambiguous statements that create a false impression. In each instance, both the speaker's goal and the effect are the same–to "purposely produce[] a false impression upon [the listener's] mind." *Stewart* v. *Wyoming Cattle Ranche Co.*, 128 U.S. 383, 390 (1888). It is the intent to deceive and the resulting deception that support liability for fraud. The same intent and the same result exclude fraudulent speech from the protections of the First Amendment.

Although this Court in *Riley* declared invalid a state law that required all professional fundraisers to disclose at the outset of any solicitation the percentage of funds actually remitted to charities in the previous year, Illinois fraud law does not impose such a prophylactic rule of compelled speech. Illinois law imposes not a duty to disclose but only a duty not to intentionally mislead. Fundraisers must disclose information only when their own representations would otherwise mislead the listener.

The Illinois court also erred in concluding that *Riley* suggests that fraud claims of this type will impermissibly chill protected speech. This Court was concerned about a possible chilling effect in *Riley* primarily because the fundraiser bore the burden of proving that his fee was rea-

sonable. Here, in contrast, the government bears the burden of proving that the fundraiser's representations were fraudulent. Moreover, although the potential for liability under the statute in *Riley* was likely to cause fundraisers to cease soliciting, the potential for fraud liability is only likely to cause them to provide more complete information. That result is wholly consonant with the First Amendment.

ARGUMENT

THE FIRST AMENDMENT PERMITS FRAUD ACTIONS AGAINST PROFESSIONAL FUNDRAISERS WHO INTENTIONALLY MISLEAD POTENTIAL DONORS BY MISREPRESENTING HOW CHARITABLE DONATIONS WILL BE USED

The common law has long imposed liability on persons who make fraudulent misrepresentations for the purpose and with the effect of inducing others to act in justifiable reliance on the misrepresentations. See Restatement (Second) of Torts (Restatement) § 525 (1977); *e.g.*, *Stewart* v. *Wyoming Cattle Ranche Co.*, 128 U.S. 383 (1888). Under those longstanding principles, a misrepresentation is fraudulent if the maker knows or believes that it is false or acts with reckless disregard for its truth or falsity. Restatement, *supra*, § 526(a) & cmt. e. Actionable misrepresentations are not limited to affirmative or literal falsehoods. If a representation is capable of two understandings, one true and the other false, the representation is fraudulent if it is made with the intent that it be understood in the false sense or with reckless indifference as to how it will be understood. *Id.* § 527(a) and (c). A representation is also fraudulent if it "stat[es] the truth as far as it goes," but the maker knows it to be materially misleading because it omits additional or qualifying matter. *Id.* § 529.

Illinois fraud law reflects the same principles. A defendant is liable in damages for fraud if he makes a false

representation of a material fact; he knows the representation is false; he makes the representation with the intent to mislead the plaintiff; and the plaintiff justifiably relies upon the representation to his detriment. See *In re Witt*, 583 N.E.2d 526, 531 (Ill. 1991). Fraud includes "anything calculated to deceive, whether it be a single act or combination of circumstances, whether the suppression of truth or the suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or by silence." *People ex rel. Chicago Bar Ass'n* v. *Gilmore*, 177 N.E. 710, 717 (Ill. 1931). Consistent with Illinois law, petitioner has alleged that respondents committed fraud when they intentionally misled potential donors by misrepresenting the extent to which donated funds would be used to support VietNow's charitable programs, rather than to profit respondents. The Supreme Court of Illinois erred in holding that the First Amendment bars that fraud action.[4]

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[4] This brief focuses on the reasons that petitioner's common law fraud action is not barred by the First Amendment. Petitioner also alleges that respondents' misrepresentations violated various state antifraud statutes. See note 1, *supra*. For essentially the same reasons, liability under those statutes is also consistent with the First Amendment, at least to the extent it is premised on knowing misrepresentations made with intent to mislead. Violations of those statutes, like violations of similar statutes enforced by the FTC, do not in all circumstances require proof that misrepresentations are knowing and intentional. See, *e.g.*, *Removatron Int'l Corp.* v. *FTC*, 884 F.2d 1489, 1495 (1st Cir. 1989) (construing FTC Act); 815 Ill. Comp. Stat. Ann. 505/2 (West 1999) (in construing Illinois Consumer Fraud and Deceptive Business Practices Act, courts should give "consideration" to FTC and federal court interpretations of FTC Act). The complaint in this case, however, alleges misrepresentations that are knowing and intentional.

A. Fraudulent Speech, Including Fraudulent Chariable Solicitation, Is Not Protected By The First Amendment

1. The government's power to protect the public against fraud "has always been recognized in this country and is firmly established." *Donaldson* v. *Read Magazine*, 333 U.S. 178, 190 (1948). That power is well-established even though fraudulent misrepresentations virtually always involve speech.

The government's interest in preventing fraud is no less important and no more constitutionally problematic in the area of charitable solicitation. When a charity or fundraising organization intentionally misleads donors about the uses to which donated funds will be put, it defrauds both the donors and the causes that they are seeking to help. At the same time, when fraud leads potential donors to question the integrity and reliability of charitable solicitations, the ability of honest fundraisers to raise funds is impaired, and the charitable causes that they represent pay the price. See *Developments in the Law—Nonprofit Corporations*, 105 Harv. L. Rev. 1578, 1645, 1647 (1992) (ability of charities to raise funds is vulnerable to fluctuations in donor confidence). The prevention of fraud in the field of charitable solicitation is therefore a longstanding and important governmental interest. See *Watchtower Bible & Tract Soc'y of New York, Inc.* v. *Village of Stratton*, 122 S. Ct. 2080, 2089 (2002). Unnecessary limits on the government's ability to pursue that interest not only leave the public inadequately protected from deception but also may chill charitable giving.

The government's power to prohibit fraud and to prosecute those who commit it is not restricted by the First Amendment. Fraud is one of the "limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572 (1942). The

intentional lie belongs to "that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (quoting *Chaplinsky*, 315 U.S. at 572). Indeed, false representations affirmatively "interfere with the truth-seeking function of the marketplace of ideas." *Hustler Magazine* v. *Falwell*, 485 U.S. 46, 51 (1988).

For those reasons, it has been settled for more than 60 years that those who seek to extract money from the public through fraudulent misrepresentations are not shielded by the First Amendment. See, *e.g.*, *Schneider* v. *State*, 308 U.S. 147, 164 (1939); *Cantwell* v. *Connecticut*, 310 U.S. 296, 306 (1940); *Donaldson*, 333 U.S. at 191-192. This Court has repeatedly rejected the proposition that the First Amendment "includes a right to raise money * * * by deception of the public." *Donaldson*, 333 U.S. at 192. Instead, as the Court stated in *Schneider*, "[f]rauds may be denounced as offenses and punished by law" without thereby abridging the freedom of speech and the press. 308 U.S. at 164.

2. The government's power to prohibit fraud has coexisted with the First Amendment for more than 200 years not merely because fraudulent speech is unprotected but because the essential elements of common law fraud also provide sufficient breathing room for protected expression. Most significant is the scienter requirement. Falsity alone is not enough to subject a fundraiser to liability for fraud. Instead, the government must prove that the fundraiser knew or believed his representation was false or that he acted with reckless disregard for its truth or falsity. See pp. 10-11, *supra*. That requirement eliminates any uncertainty on the part of the fundraiser about whether his conduct is actually protected and substantially reduces the risk that a

court will mistakenly determine that it is unprotected. In other contexts, such as libel, essentially the same standard has been held to provide sufficient breathing room for protected speech. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 280 (1964); *Bose Corp.* v. *Consumers Union of the United States, Inc.*, 466 U.S. 485, 502 & n.19 (1984) (noting "kinship" between *New York Times* standard and "motivation that must be proved to support a common-law action for deceit").

Other elements of fraud law besides the scienter requirement provide additional breathing room for protected speech. For example, the plaintiff must prove that the speaker intended the listener to rely on the misrepresentation and that reliance was justified because the misrepresentation was material. Restatement, *supra*, §§ 525, 537, 538. In many States, including Illinois, fraud must be proved by clear and convincing evidence. See *Hofmann* v. *Hofmann*, 446 N.E.2d 499, 506 (Ill. 1983); cf. *Gertz*, 418 U.S. at 342 (requiring clear and convincing evidence of "actual malice" in defamation cases). And some jurisdictions require that fraud be pleaded with particularity. See, *e.g.*, Fed. R. Civ. P. 9(b).

To the extent that the risk of chilling speech remains a concern, that concern can be accommodated by special procedural mechanisms, such as independent appellate review, that leave the substantive state law of fraud undisturbed. Cf. *Bose Corp.*, 466 U.S. at 498-511 (de novo appellate review of findings regarding actual malice). What the First Amendment does not require is that a fundraiser who intentionally misleads potential donors be excused altogether from liability for fraud. Yet that is what the Illinois Supreme Court mistakenly held here.

B. Fraudulent Charitable Solicitation Frequently Involves Misrepresentations About How Contributions Will Be Used

1. In this case, the State of Illinois seeks to do precisely what this Court has repeatedly endorsed as constitutional–to sanction a charitable fundraiser for using intentional misrepresentations to defraud members of the public. Construed "in the light most favorable to" petitioner (Pet. App. 5), the complaint alleges that respondents made at least two fraudulent misrepresentations. First, they falsely represented that "a significant amount of each dollar donated would be paid over to Vietnow for its charitable purposes while in fact [respondents] knew that * * * 15 cents or less of each dollar would be available" for those purposes. Am. Compl. ¶ 34. Second, they falsely represented that "the funds donated would go to further Vietnow's charitable purposes" (*id.* ¶ 29) when the funds actually were going primarily for private profit. See *id.* ¶ 35 ("the amount of funds being paid over to charity was merely incidental to the fundraising effort" which was conducted "for the private pecuniary benefit of" respondents and their agents).

Respondents allegedly made those misrepresentations through a combination of statements, actions, and omissions. They specifically told potential donors that contributions would be used to provide direct assistance to homeless, ill, and injured veterans, including job training, rehabilitation, food, and assistance with rent and other bills. See pp. 3-4 & nn. 2-3, *supra*. Written materials stated that a "substantial portion of the proceeds will be spent on the cost of the public awareness campaign and our program service," which was described as direct assistance. Am. Compl. ¶ 30, Exh. F. In one instance, a donor was told that "90% or more" of contributions "go to the vets." *Id.* Group Exh. H at C000358. Another donor was told her donation would not be used for "labor expenses" because "all members are volunteers." *Id.*

at C000329. At the same time, respondents failed to disclose "that the campaign was being conducted pursuant to private for-profit contracts" and that "a negligible amount, or only 15%, of all funds raised would be given to VietNow and used for its charitable purpose." Am. Compl. ¶ 37.

2. Those misrepresentations are typical of the charitable solicitation frauds that the federal government prosecutes both civilly and criminally. Those prosecutions frequently involve fundraisers who mislead the public by creating false impressions about how contributions solicited in the name of charity will actually be used.

For example, in one instance, fundraisers told prospective donors that they were calling on behalf of Feed America to ask for help "with the national campaign to help Feed America." *United States* v. *Ciccone*, 219 F.3d 1078, 1081 (9th Cir. 2000). Donors were told that "[w]hat Feed America does is feed the homeless of America" and that it was "about time that we took care of our own people." *Ibid.* Of the more than $2.3 million that Feed America received, it gave less than $150,000 to legitimate charities, and the remainder "was deposited in [the owner's] personal bank account." *Ibid.* In another case, the defendant ran two charities and a telemarketing operation from his residence. *United States* v. *Cherna*, 184 F.3d 403, 405-406 (5th Cir. 1999), cert. denied, 529 U.S. 1065 (2002). The telemarketers for one of the charities told prospective donors in Massachusetts that "donations would benefit local veterans' hospitals" and "would be used to purchase medical supplies for hospitalized veterans." *Id.* at 410. In fact, the charity donated only $650 to Massachusetts veterans hospitals, and its nationwide donations totaled only one-tenth of one percent of its total income. *Ibid.*[5]

[5] See also, *e.g.*, FTC Resp. To Mot. For Judgment On The Pleadings 18, *FTC* v. *Gold*, No. CV-99-2895-CBM (C.D. Cal. filed Nov. 6, 2000) (defendants falsely represented that donations would support charitable programs when only de minimis amounts—between .01% and 3.5%—were spent on such programs).

Some fraud cases involve fundraisers who pay charities a flat fee in exchange for using the charities' names to raise money. For example, in *United States* v. *Kinney*, 211 F.3d 13 (2d Cir. 2000), a fundraiser contracted with a charity to solicit contributions in the charity's name by selling advertising space in journals. The fundraising agreement provided for $40,000 to go to the charity and the remainder to be retained by the solicitor. *Id.* at 15. The solicitation scheme raised over $200,000, the charity received only the flat fee, and no journals were produced. *Ibid.*[6]

Telemarketers sometimes form charities for the express purpose of carrying out fraudulent solicitation schemes. See, *e.g.*, *People* v. *Orange County Charitable Servs.*, 87 Cal. Rptr.2d 253, 258 (Ct. App. 1999) (describing how professional fundraiser caused business associates to form charities for the purpose of entering into fundraising contracts with them). Similarly, for-profit fundraisers sometimes use names that sound like charitable organizations and fail to disclose their for-profit status in order to mislead donors about how contributions will be used. See, *e.g.*, *id.* at 258, 260.

3. The ruling of the Supreme Court of Illinois, if affirmed by this Court, would seriously impair the government's ability to prosecute those kinds of fraud. The state court did not base its ruling on any insufficiency of the allegations in the complaint under Illinois law. Rather, the court concluded that First Amendment principles set out in three decisions by this Court—*Schaumberg*, *Munson*, and *Riley*—foreclose petitioner from pursuing the claim. The court reasoned that those cases prohibit reliance on respondents'

[6] See also Order Den. Mot. To Dismiss Counts And Granting Alternative Mot. To Strike Allegations 1, *United States* v. *Gold*, No. SACR 01-150 DOC (C.D. Cal. Feb. 25, 2002).

retention of 85% of the donated funds to establish the falsity of respondents' representation that a significant portion of donated funds would go to VietNow's direct assistance programs; that *Riley*'s invalidation of a state disclosure statute precludes a fraud action premised on the failure to disclose the percentage of donations actually delivered to VietNow; and that *Riley* indicates that fraud actions of this type impose an unjustifiable chill on protected speech. Pet. App. 13-16. Under the court's view, even if respondents knew their representations were false, intended to mislead potential donors, and did in fact mislead them, the First Amendment bars Illinois from sanctioning respondents and entitles them to continue their fraudulent conduct in the future. In so holding, the court misunderstood this Court's precedents and unjustifiably curtailed the government's ability to protect the public from fraud.

C. This Court's Precedents Do Not Preclude Fraud Actions Based On Misrepresentations That A Significant Portion Of Donations Will Be Spent On Particular Charitable Purposes

Contrary to the holding of the Illinois Supreme Court, nothing in this Court's decisions in *Schaumberg*, *Munson*, and *Riley* suggests that the government may not prosecute fraud actions that are based on misrepresentations concerning the percentage of donations that will go to charity or the particular charitable purposes for which donations will be used. The laws invalidated in those cases prohibited charitable organizations or professional fundraisers from engaging in charitable solicitation if they spent high percentages of donated funds on fundraising—whether or not any fraudulent representations were made during the fundraising. The cases therefore do not place any limitation on the kinds of fraudulent misrepresentations that the government may prohibit. Rather, they reaffirm that the government may prosecute fraudulent misrepresentations

by those who solicit funds in the name of charity provided it does so directly.

1. In *Schaumberg*, *Munson*, and *Riley*, this Court made clear that charitable solicitation implicates significant First Amendment interests and that nonfraudulent charitable solicitation is therefore protected by the First Amendment. See *Schaumberg*, 444 U.S. at 632-633; *Munson*, 467 U.S. at 959; *Riley*, 487 U.S. at 789. Consequently, when, as in those cases, the government regulates *nonfraudulent* charitable solicitation, even as a prophylaxis against fraud, the government must employ "narrowly drawn regulations designed to serve [its legitimate] interests without unnecessarily interfering with First Amendment freedoms." *Schaumberg*, 444 U.S. at 637.

In *Schaumberg*, the Court struck down as insufficiently tailored a local ordinance that categorically prohibited the solicitation of contributions by charitable organizations that used less than 75% of their receipts for "charitable purposes." See 444 U.S. at 622. Similarly, in *Munson*, the Court invalidated a state law that prohibited charities from soliciting if they used more than 25% of donations for fundraising expenses, but exempted charities that could demonstrate that the limit would effectively prevent them from raising contributions. 467 U.S. at 950-951 n.2. And, in *Riley*, the Court declared unconstitutional a state law that prohibited professional fundraisers from retaining "unreasonable" fees and used a three-tiered schedule of retention rates to determine the reasonableness of particular fee arrangements. 487 U.S. at 784-785. The three statutes suffered from the same "primary defect": rather than directly prohibiting actual fraud, "fraud [was] presumed by a surrogate and imprecise formula." *Id.* at 794 n.8. See *Schaumberg*, 444 U.S. at 636-637; *Munson*, 467 U.S. at 966-967.[7]

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[7] The Court in *Riley* also struck down a state law that required every professional fundraiser to disclose, at the outset of any solicitation, the

Schaumberg, *Munson*, and *Riley* thus establish that a State may not attack fraudulent charitable solicitation by enacting a broad prophylactic ban on activities that are not themselves fraudulent, at least when the prohibition significantly impairs the ability of charities to engage in protected speech. At the same time, however, all three cases make clear that nothing in the First Amendment prevents a State from directly pursuing actual fraud by those who solicit funds in the name of charity. Indeed, direct prohibitions on fraudulent speech were the narrowly drawn alternative against which the broader prophylactic rules were judged.

In *Schaumberg*, the Court emphasized that "[f]raudulent misrepresentations [by fundraisers] can be prohibited and the penal laws used to punish such conduct directly." 444 U.S. at 637. In *Munson*, the Court similarly stressed that "concerns about fraudulent charities[] can [be] and are accommodated directly" through "penalties for fraudulent conduct." 467 U.S. at 968 n.16. And, in *Riley*, the Court emphasized once more that States need not "sit idly by and allow their citizens to be defrauded." 487 U.S. at 795. Instead, "the State may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements." *Id.* at 800.

As the Court explained in *Schaumberg*, penalizing fraudulent misrepresentations "may help make contribution decisions more informed, while leaving to individual choice the decision whether to contribute to organizations that spend large amounts on salaries and administrative expenses." 444 U.S. at 638. Thus, rather than being constitutionally suspect, direct prohibitions on fraudulent misrepresentation are a "less intrusive," narrowly tailored, and constitutionally

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average percentage of charitable contributions that the fundraiser had turned over to the charities for which it raised money during the previous 12 months. 487 U.S. at 786. The implications of that holding are discussed at pp. 23-26, *infra*.

preferred means of furthering the government's "legitimate interest in preventing fraud." *Id.* at 637.

2. Here, petitioner is doing what the Court expressly approved in *Schaumberg*, *Munson*, and *Riley*. Petitioner is pursuing fraud directly and is holding respondents responsible only because their solicitation was knowingly and intentionally false. Petitioner is not employing a "[b]road prophylactic rule[]" (*Schaumberg*, 444 U.S. at 637) that has "no nexus * * * [to] the likelihood that the solicitation is fraudulent" (*Riley*, 487 U.S. at 793). Instead, petitioner is pursuing fraud in the most direct and "narrowly drawn" way possible (*Schaumberg*, 444 U.S. at 637)–by seeking to attach liability to fraudulent misrepresentations themselves. Petitioner's fraud claim thus falls on the constitutional side of the line drawn by the Court's cases–the line "between regulation aimed at fraud and regulation aimed at something else in the hope that it would sweep fraud in during the process." *Munson*, 467 U.S. at 969-970.

Another significant difference between the fraud claim here and the percentage limitations in *Schaumberg*, *Munson*, and *Riley* is that those laws actually prohibited truthful charitable solicitation, if the government deemed fundraising expenses excessive. Fraud law, in contrast, does not prohibit fundraisers from engaging in charitable solicitation no matter how high their expenses. As long as they do not intentionally mislead donors regarding how their contributions will be used, fundraisers who retain a high percentage of contributions are free to solicit.

Accordingly, this Court's observations in *Schaumberg*, *Munson* and *Riley* that there may be legitimate reasons for a charity's high solicitation costs or a solicitor's high rate of retained receipts do not cast any doubt on this fraud prosecution. Contra Pet. App. 13-15. No matter how high a charity's fundraising costs, or what percentage of donations are used to provide direct services, the law of fraud poses no

obstacle to fundraisers who avoid intentional misrepresentations. For example, if a charity was conducting an advertising or awareness campaign that advanced charitable purposes in conjunction with its fundraising activity, its representation that donated funds were going to "charitable purposes" would not be misleading, much less intentionally so. But here respondents are alleged to have represented not just that donated funds would be used for charitable purposes but that a substantial portion would be spent on direct assistance to veterans when they knew it would not, and to have represented that the fundraising was not for profit when they knew it was primarily for their own pecuniary benefit. Those representations are no less false because some funds may also have been used to promote public awareness or to produce advertising material.

There is no reason to exempt statements concerning fundraising costs or the intended use of donated funds from prohibitions on fraud. Donors place great importance on how their donations will be used, particularly whether they will be used for charitable programs rather than fundraising and administrative costs. See, *e.g.*, Better Business Bureau Wise Giving Alliance, *Donor Expectations Survey* 4-6 (Oct. 17, 2001) *available at* <http://www.give.org/news/Donor%20Expectations%20Survey.pdf>. The Illinois Supreme Court would appear to grant solicitors immunity even if they affirmatively misrepresent that highly material information. Indeed, the court affirmed the complaint's dismissal notwithstanding allegations that a donor "specifically asked" what percentage of her contribution would go to fundraising "and was told 90% or more goes to the vets" (Am. Compl. Group Exh. H at C000358) and that written material stated that "*[a] substantial portion of the proceeds will be spent on* the cost of the public awareness campaign and *our program service*" (*id.* Exh. F (emphasis added)).

D. Nothing in *Riley* Precludes Fraud Claims Based On Implied Misrepresentations About How Charitable Donations Will Be Used

1. Although the allegations just described could be viewed as affirmative misrepresentations, the Supreme Court of Illinois either overlooked them or determined that they did not amount to literal falsehoods. The court stated that the complaint contained "no allegation that defendants made affirmative misstatements to potential donors." Pet. App. 2. In the absence of affirmative misstatements, the court regarded imposing liability for fraud as tantamount to "plac[ing] on solicitors the affirmative duty to disclose to potential donors, at the point of solicitation, the net proceeds to be returned to the charity." *Id.* at 15. The court regarded that result as inconsistent with this Court's invalidation of the compulsory disclosure statute in *Riley*. *Id.* at 16. Contrary to that conclusion, even if the complaint were viewed as alleging no affirmative misrepresentations, its allegations would still be sufficient to bring it within the traditional contours of common law fraud and to place it outside the boundaries of the First Amendment.

The common law of fraud draws no distinction between one who intentionally misleads through explicit misrepresentations and one who does so through implicit misrepresentations or ambiguous representations calculated to produce misunderstanding. See pp. 10-11, *supra*. In each instance, both the speaker's goal and the effect are the same–to "purposely produce[] a false impression upon [the listener's] mind." *Stewart*, 128 U.S. at 390. In each instance, "the deception may often be as base, and the injury to others as great." *Hays* v. *Meyers*, 107 S.W. 287, 288 (Ky. 1908). It is the intent to deceive and the resulting deception that support liability for fraud. And it is the same intent and the same result that deprive fraudulent misrepresentation of

protection under the First Amendment, whether the misrepresentation is express or implied.

Contrary to the Illinois court's belief, *Riley* does not require a different result. In addition to invalidating the percentage limitation discussed above, the Court in *Riley* also struck down a related provision that required every professional fundraiser to disclose, at the outset of any solicitation, the average percentage of charitable contributions that the fundraiser had turned over to the charities for which it raised money during the previous 12 months. 487 U.S. at 786. The Court characterized that provision as a "prophylactic rule of compelled speech, applicable to all professional solicitations," and subjected it to "exacting First Amendment scrutiny." *Id.* at 798. The Court invalidated the law because it was an "imprecise" "burdensome rule," and "more benign and narrowly tailored options" were available to serve the State's goal of preventing donors from being misled. *Id.* at 800. Among the "narrowly tailored options" identified by the Court was the State's ability to "vigorously enforce its antifraud laws" against charitable solicitors who "obtain[] money on false pretenses or by making false statements." *Ibid.*

It is one thing to compel every fundraiser to disclose certain information, but it is quite another to treat the failure to disclose that information, when it is accompanied by other affirmative statements and misrepresentations, as the basis for a fraud claim. The former is an over-inclusive requirement that compels speech by even the most scrupulous fundraiser; the latter is a narrowly tailored prohibition that applies only to fundraisers who intentionally mislead. The Court's invalidation of the over-inclusive disclosure rule in *Riley* thus does not call into question petitioner's ability to prosecute respondents for purposely creating a false impression that a significant percentage of donations would go to specific charitable programs by, among other things, failing

to disclose that, in fact, only about 3% of gross donations would be devoted to those purposes.

In contrast to the disclosure law in *Riley*, Illinois fraud law imposes not a duty to disclose, but only a duty not to intentionally mislead. Common law fraud requires charitable solicitors like respondents to disclose information only when their own words–here, respondents' representations that contributions would be used for particular charitable programs–would otherwise mislead the listener, and where they intend or foresee that the listener will be misled. See Restatement, *supra*, §§ 527(a)-(c), 529, 551(2)(b). There is nothing constitutionally invidious about a rule of liability that compels someone to provide information, if at all, only when his own words would otherwise "purposely produce[] a false impression upon [the listener's] mind" (*Stewart*, 128 U.S. at 390). Freedom of speech may well "compris[e] the decision of both what to say and what *not* to say" (*Riley*, 487 U.S. at 797), but it does not comprise the right to use ambiguities and half-truths in order to deceive.

To the extent that petitioner's complaint alleges that respondents committed fraud by misleading donors into believing that contributions would not go to profit respondents, there can be no question that the complaint is permissible under *Riley*. The misimpression that the fundraising was not a profit-making enterprise could have been cured if respondents had disclosed their professional, for-profit status. And the *Riley* opinion expressly states that a disclosure requirement of that nature is constitutional. See 487 U.S. at 799 n.11.

Riley thus does not limit fraud in the area of charitable solicitation to literal and express falsehoods. Such a limitation would seriously impair the government's ability to protect the donating public from deception. There would be no recourse against a fundraiser who asserted that he was collecting money "to feed the homeless" but intended to use

only one penny out of every hundred dollar donation for that purpose and to use the rest for personal luxury items. Nor could the government take action against a fundraiser who informed donors that he was collecting money for a particular charity when he intended to give the charity a fixed dollar amount from the proceeds regardless of how much he actually collected. The government also would be barred from pursuing fraud actions against fundraisers who incorporate charities for the very purpose of contracting with them to solicit contributions, the lion's share of which will go for the fundraisers' personal profit. The First Amendment does not require that the government countenance such "shabby attempt[s] to get the benefit of a fraud, without incurring the responsibility." *Smith* v. *Chadwick*, 9 App. Cas. 187, 201 (1884) (Lord Blackburn) (appeal taken from Eng. C.A.).

2. *Riley* also does not suggest that a prosecution like the one in this case unjustifiably chills protected speech. Relying on *Riley*, the Supreme Court of Illinois expressed concerned that, if a State could pursue claims of fraud like the one here, protected speech would suffer "a substantial chilling effect" because fundraisers "would have the burden of defending the reasonableness of their fees, on a case-by-case basis, whenever in the Attorney General's judgment the public was being deceived * * * because the fundraiser's fee was too high." Pet. App. 16. Direct prosecutions of fraud do not, however, present the same chilling effects that this Court identified in *Riley*.

This Court's concern in *Riley* that case-by-case litigation about the "reasonableness" of fundraising fees would "chill speech" arose primarily because the statute there placed the burden of proof on the fundraiser. 487 U.S. at 793-794. The Court has frequently concluded that, to avoid chilling protected speech, the government must bear the burden of proving that the speech it seeks to prohibit is unprotected.

See *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965); *Speiser* v. *Randall*, 357 U.S. 513, 525-526 (1958). But the government *does* bear the burden of proof in a fraud action.

In addition, the statute in *Riley* posed a particular risk of chilling speech because liability did not depend on the truthfulness of the solicitor's representations. The only way to avoid the risk of litigation was to cease soliciting. Here, in contrast, liability for fraud depends entirely on the truth of the solicitor's representations. Accordingly, a solicitor can avoid liability by avoiding misrepresentations and providing enough information to ensure that his representations are not misleading. As a result, the potential for fraud liability should not lead individuals to cease soliciting, but rather should result in more speech rather than less.[8]

That result is entirely consonant with the First Amendment, for it furthers the public interest in receiving "truthful information about a matter of public significance." *Smith* v. *Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979). And, if informed members of the public decide, after hearing a fundraiser's solicitation, that they would prefer to direct their charitable donations elsewhere, that too is consistent with First Amendment values. See *Schaumberg*, 444 U.S. at 637-638.

As discussed above, the essential elements of common law fraud themselves provide sufficient breathing room for protected speech, including charitable solicitation, and any further protection that may be necessary can be provided by additional procedural safeguards such as independent appellate review. See pp. 13-14, *supra*. The Illinois Supreme

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[8] Moreover, the statute in *Riley* imposed a distinct chilling effect on charitable solicitation. The law of fraud, by contrast, imposes no more chilling effect on charitable solicitation than on any other form of speech that can be used for legitimate purposes or misused for fraudulent purposes. The law of fraud has never been thought to chill speech impermissibly by creating an incentive to avoid fraudulent statements.

Court mistakenly concluded that those protections are insufficient. Instead, the court restricted the scope of fraud to affirmative misstatements or claims where the falsity of a solicitor's representations is not proved by the amount of donated funds he retains. As the Court has held in the libel context, however, such substantive limits on the concept of falsity are not necessary to protect First Amendment values. Thus, the Court has held that the First Amendment does not preclude a libel action based on an expression of opinion that implies a false statement of fact. *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 18-21 (1990). And the Court has "reject[ed] any special test of falsity for quotations." *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496, 516 (1991). Similarly, no special test for falsity is warranted here.[9]

[9] Rather, falsity is determined by "the effect [that the representations] would produce, under the circumstances, upon the ordinary mind." See W. Page Keeton, *Prosser and Keeton on The Law of Torts* 736 (5th ed. Hornbook Series Law. ed. 1984). One well-accepted method of establishing the effect that representations have on the general public's understanding is a methodologically sound survey. See *Kraft, Inc.*, v. *FTC*, 970 F.2d 311, 318 (7th Cir. 1992), cert. denied, 507 U.S. 909 (1993). Expert opinion testimony, and, to a more limited extent, consumer testimony may also be relevant. See *id.* at 318.

CONCLUSION

The judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted.

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IN THE
SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE STATE OF ILLINOIS
ex rel. JAMES E. RYAN, ATTORNEY GENERAL
OF THE STATE OF ILLINOIS,

Petitioner,

v.

TELEMARKETING ASSOCIATES, INC.,
RICHARD TROIA AND ARMET, INC.,

Respondents.

**On Writ of Certiorari To The
Supreme Court of Illinois**

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF PETITIONER

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No. 01-1806

IN THE

SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE STATE OF ILLINOIS
ex rel. JAMES E. RYAN, ATTORNEY GENERAL
OF THE STATE OF ILLINOIS,

Petitioner,

v.

TELEMARKETING ASSOCIATES, INC.,
RICHARD TROIA AND ARMET, INC.,

Respondents.

On Writ of Certiorari To The Supreme Court of Illinois

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1/]

AARP is a non-profit, non-partisan organization with more than 35 million members aged 50 and older. As the largest membership organization representing the interests of older Americans, AARP is greatly concerned about the rampant telemarketing fraud perpetrated against older people, including deceptive and misleading charitable solicitations. Because many people do not realize that they are victims, and many others are

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[1/] Letters indicating the parties' consent to the filing of this brief have been filed with the Clerk of the Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its counsel, or its members made a monetary contribution to the preparation or submission of this brief.

unwilling to report these frauds to law enforcement agencies, there is no way to quantify with any certainty either the number of victims or the dollars lost to these scams. Congress has estimated, however, that $40 billion is lost to fraudulent telemarketers annually. *See* Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6101(3) (2002).

Many victims are older people, specifically targeted by these scam artists. Consequently, AARP supports federal and state laws, regulations, and public policies designed to outlaw fraudulent and deceptive telemarketing practices and to provide adequate remedies for victims. Several years ago, in recognition of the fact that older people are favorite targets of fraudulent telemarketers, AARP made federal and state legislative and regulatory initiatives and public education on this issue a priority. For example, AARP participated in the Federal Trade Commission's (FTC) promulgation of the Telemarketing Sales Rule, 16 C.F.R. § 310 (2002), by submitting extensive written comments in response to two notices of proposed rulemaking and appearing at a three-day public hearing convened by the Commission. AARP supports continued FTC monitoring of the telemarketing Rule to determine where improvements are necessary, and is involved in the agency's current rulemaking to revise the Rule, submitting written comments and participating in a workshop this past summer.

AARP also actively supports state legislative efforts to enact laws aimed at curbing telemarketing fraud and enhancing consumer protections. In addition to supporting the enactment of "do not call" laws on the state level, AARP submitted comments in response to the FTC's recent announcement of its intent to create a national "Do Not Call" registry. In July 2002, AARP submitted testimony to Congress in connection with reauthorization of the FTC, focusing on the Telemarketing Sales Rule and creation of the Do Not Call registry. AARP's testimony noted that the Rule provides states with a floor of consumer protection, and that nearly thirty states have enacted laws and regulations that expand upon the Rule's protections and prohibitions to better protect consumers. As with its earlier comments and testimony with respect to the FTC's promulgation of the original Rule, AARP's congressional testimony noted the importance of making sure that the FTC's national Do Not Call registry not preempt state efforts to establish

stronger consumer protections. *See Hearing on Federal Trade Commission Reauthorization before the Consumer Affairs, Foreign Commerce and Tourism Subcomm. of the Senate Commerce, Science and Transp. Comm.* (July 17, 2002) (testimony of AARP Board Member Charles Mendoza), *at* http://www.aarp.org/press/testimony/2002/071702.html.

In addition, AARP has been an active partner with state and federal law enforcement and consumer protection agencies, supporting the investigation and prosecution of fraudulent telemarketers. For example, in 1995, AARP members became undercover witnesses for the FBI and attorneys general, tape recording conversations with suspected fraudulent telemarketers. The recordings became the foundation for "Operation Senior Sentinel" prosecutions, as they revealed the actual misrepresentations and deceptive pitches made to convince consumers to make purchases or otherwise send money.

AARP also has focused on educating consumers about how to identify and avoid fraudulent pitches and steps they should take to enforce their rights when they have been defrauded. AARP has released several publications and public service announcements and published articles to advance this goal. *See, e.g.*, Carole Fleck, *Beware, Be Wise About Donations*, AARP Bulletin (AARP, Wash., D.C.), Dec. 2002, at 18; Patricia Barry, *Charities: Give well but wisely*, AARP Bulletin (AARP, Wash., D.C.), Dec. 1999, at 3; AARP, Press Release, Charity Scams Likely to Target Older Americans, AARP Warns (Sept. 19, 2001), *at* http://www.aarp.org/press/2001/nr091901.html; AARP, *Are Your Donations Hitting Their Target?: Charity Scams and Deceptive Fundraising Tactics*, Senior Consumer Alert, Fall 1997; AARP, *Consumer Fraud: Telemarketing*, Consumer Affairs Fact Sheet, June 1996; AARP, *Fundraising Solicitations*, Consumer Affairs Fact Sheet, June 1995; AARP, *Congratulations!! You May Have Just Saved Money & Lots of Grief*, Senior Consumer Alert, Fall 1994; AARP, *Contests & Sweepstakes -- Don't Be A Loser*, Consumer Affairs Fact Sheet, Sept. 1994. AARP worked with state and federal law enforcement and regulatory agencies, as well as consumer and industry groups, to develop consumer education messages and to support investigation and prosecution of fraudulent telemarketers.

At the same time, AARP recognizes the dynamics involved in charitable fundraising. In the next year, the AARP Foundation, AARP's affiliated charitable organization, will begin a direct mail campaign to raise money to support its charitable programs. The Foundation has not hired professional fundraisers nor does it engage in telemarketing in its charitable solicitations.

Because of AARP's concerns about fraudulent telemarketing pitches, and the particular targeting of older people, AARP submits this brief as *amicus curiae* in support of Petitioner's position that the First Amendment does not bar states from seeking to prove a fraud charge against a professional fundraiser that misrepresents that monies raised will be used for charitable purposes.

SUMMARY OF ARGUMENT

Telemarketing fraud robs Americans of billions of dollars every year. Many victims are older people, specifically targeted by fraudulent telemarketers. AARP's research has shown that older people are inundated by telemarketers and seem particularly vulnerable to fraudulent telemarketing pitches; they seem unable to spot fraud when it is occurring, have difficulty terminating sales calls, and repeatedly take the bait set by fraudulent telemarketers. While the research provides no easy answer as to why people fall for fraudulent telemarketing schemes, it does show that people have a great deal of difficulty differentiating between fraudulent and legitimate calls.

The scope of telemarketing fraud underscores the importance of federal and state authorities having a full arsenal of weapons to investigate and prosecute fraudulent telemarketers and to seek redress for victims. Fraud prosecutions are a critical component in the fight against these telemarketers. Yet, the Illinois courts have closed off this important avenue of redress. This is despite the Court's recognition that states have a substantial interest in protecting the public and charities from fraud and that "[f]raudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly." *Village of Schaumberg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980); *see also Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 792 (1988). When indicia of fraud are present, prosecutors should be afforded a

chance to prove their case. While Petitioner ultimately may not be able to establish that Respondents committed fraud, neither the First Amendment nor the Court's decisions applying the Amendment to charitable solicitations warrants closing the courthouse door and depriving Petitioner of the opportunity to present its case. Unless the Court reverses the Illinois Supreme Court, the American public will have lost an important consumer protection tool and professional fundraisers will be given license to take advantage of Americans' generosity.

ARGUMENT

I. TELEMARKETING FRAUD IS RAMPANT AND COSTLY.

Telemarketing fraud is "one of the most pervasive forms of white-collar crime" in the United States. United States-Canada Working Group, *United States-Canada Cooperation Against Cross-Border Telemarketing Fraud*, Report to President Bill Clinton and Prime Minister Jean Chrétien (Nov. 1997). Congress enacted the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108 (2002), after finding that victims lose an estimated $40 billion a year, and that the Federal Trade Commission's resources were insufficient to protect consumers. *Id.* at §§ 6101(2), 6101(3).

Various congressional committees and subcommittees have held hearings on this issue. Describing his reaction to the briefing materials for one hearing, a Congressman stated: "I was stunned to learn how seemingly impervious many of these telemarketing and boiler room practices are to effective criminal prosecution. These guys are like termites. Once they are in business, you can't seem to get rid of them." *The Nature and Extent of Telemarketing Fraud and Federal And State Law Enforcement Efforts to Combat It: Hearings Before the Commerce, Consumer, and Monetary Affairs Subcomm. of the House Comm. on Gov't*

Operations, 101st Cong. 3 (1990)[2] (opening statement of Rep. J. Dennis Hastert). He noted that older people often lose their life savings, and that "[v]ery rarely are these funds ever recovered, even when there is prosecution." *Id.* Another subcommittee member characterized telemarketing fraud as a "devastating crime, robbing unsuspecting victims, not only of their money but of their self-esteem and their financial independence." *Id.* at 4 (opening statement of Rep. Frank Horton).

The testimony is replete with examples of people who lost significant sums of money to fraudulent telemarketers. An 84-year-old Georgia widow poignantly described how she lost $20,000, the entire legacy left to her by her husband and their entire life savings, in an investment scam. *Id.* at 11 (testimony of Grace L. Singletary). She stated that she had spent many years as a schoolteacher and thought of herself as an intelligent person, but that the caller sounded like someone she could trust and his persuasive manner convinced her. She described her constant worry about "a future without any savings," and asked the subcommittee "to stop this kind of sophisticated thievery." *Id.* at 14, 15.

Similar sentiment and examples surfaced at a more recent Senate hearing. Former Senator and Committee Chairman William Cohen stated:

> Everyday, senior citizens across the Nation are besieged by telemarketers who invade the privacy of their homes seeking donations to charities or making promises that are too good to be true. Telemarketing scams . . . run the gamut from small fly-by-night operators to sophisticated organized crime rings that establish boiler rooms in several cities. Whatever their size, these telephone thugs share the common motto of "reach out and scam someone," using high pressure

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[2] Congressional findings and recommendations based on this two-day hearing are found in Comm. on Gov't Operations, *The Scourge of Telemarketing Fraud: What Can Be Done Against It?*, H.R. Rep. No. 102-421 (1991).

> sales tactics and slick talk to lure their victims into sending them hundreds -- indeed, even thousands -- of dollars.

Telescams Exposed: How Telemarketers Target The Elderly: Hearing Before the Senate Special Comm. on Aging, 104th Cong. 1 (1996) (opening statement of Sen. William Cohen). He noted that tape recordings and transcripts of calls obtained during "Senior Sentinel" revealed "how unscrupulous callers engage in what amounts to 'teleterrorism' by verbally abusing, insulting and berating the senior citizens they call." *Id.* at 2. The Senator cited the example of a retired food worker in her 80's who lost more than $240,000 to fifty telemarketing businesses.

> She was told she was giving her money to an organization that helped children avoid drugs and she sent the money saying that perhaps, "If I could save the life of just one child, it would be worth it." The woman told committee investigators that she lost her life savings to these scams . . . . Needless to say, none of her donations actually went to a legitimate charity.

Id.

II. AARP RESEARCH DEMONSTRATES VULNERABILITY TO TELEMARKETING FRAUD.

In order to better understand the motivations of telemarketing fraud victims and, thereby, design an effective campaign to help them avoid being victimized, AARP sponsored the first large-scale survey ever to investigate telemarketing fraud among older people. AARP respectfully suggests that a discussion of this research will assist the Court in understanding the dynamics at play in telemarketing fraud. The Court thus will have a clearer picture of why it is important for states to retain the authority to investigate and prosecute when telemarketers misrepresent to potential donors the uses to which their contributions will be put.

The AARP Survey, conducted by Princeton Survey Research Associates, paints a surprising portrait of victims and debunks some of the theories previously advanced to explain why older people seem particularly vulnerable to telemarketing fraud. AARP, *Telemarketing Fraud and Older Americans: An AARP Survey* (1996) (copies lodged with the Clerk). Although the focus of the Survey was on sweepstakes and prize promotions, fraudulent telemarketers used similar tactics whether they were promoting a contest or soliciting a charitable contribution. As described more fully below, the victims are relatively affluent, well educated, and informed; they are active in their communities; and they express many of the same attitudes about telemarketers that are widely held by people who do not fall prey to fraudulent schemes. This description stands in marked contrast to the prevailing view of older victims, based on anecdotal evidence, as socially isolated, ill-informed, confused, and committed to old-fashioned ideas about how one should treat strangers who call on the phone. The Survey confirmed, however, that thousands of people take the bait set by fraudulent telemarketers every day.

The Survey is based on interviews with 745 telemarketing fraud victims aged fifty and older. All of the victims were identified as participants in at least one of a number of fraudulent telemarketing schemes investigated and prosecuted at the state or federal level. Many of the names appeared on lists maintained by the telemarketers themselves that prosecutors obtained during the course of their investigations. It is interesting to note that the people on the telemarketers' lists do not necessarily think of themselves as victims of fraud. All of the victims were notified of the prosecution of the telemarketer and their inclusion on a list of victims as part of the case. The prosecutors noted, however, that many, if not most, victims continued to believe they had not been defrauded. In fact, many felt they would have received their vacation, prize, car, etc., if only the Attorney General or U.S. Attorney had not shut down the telemarketer's operation.

1. Victim profile

The Survey confirmed that older people appear to fall victim to telemarketing fraud much more than younger people. More than

half (56%) the victims[3/] contacted for this survey based on prosecutors' lists were aged fifty and older, while then-current census data indicated that only 36% of the adult population was in this age group. *Id.* at 4. Among the victims, 14% were seventy-five and older, while only 7% of the total adult population was in this age bracket. *Id.*

2. Social networks and activities

Contrary to the prevailing image of older telemarketing fraud victims derived from anecdotal evidence, the Survey showed they were not socially isolated. Older victims had living arrangements that were similar to older people in general. Only 28% of the victims lived alone, compared to census figures indicating that 21% of all people aged fifty and older lived alone. *Id.* Older telemarketing fraud victims had extensive networks of family and friends with whom they were in regular, close contact. Eighty percent of victims lived near family, and almost all (96%) lived near friends. *Id.* Many victims (41%) visited with a friend or relative in the week before the survey interview and almost half (47%) had a telephone conversation with a friend or family member during that period. *Id.* Only 1% of the older victims had not had any personal contact with someone close to them in the week preceding the interview. *Id.*

Again, contrary to popular belief, older victims were quite active in their communities. Almost two-thirds (64%) of victims attended a religious institution at least once during the week before the interview. *Id.* In addition, during the week before the interview, half of the victims (54%) attended a club or social group meeting, 38% did volunteer work, and 12% went to a movie or show. *Id.* at 5.

[3/] Throughout the Survey, "older fraud victims" and "victims" are used as a shorthand to refer to people fifty and older who were victims of telemarketing fraud.

3. Media exposure

Older victims were very attentive to news and consumer information. Eight in ten read a newspaper regularly, 79% read magazines regularly, and 81% watched the local news on a regular basis. *Id.* at 6. Seventy percent of victims subscribed to cable television, and 75% of those (52% of all victims) watched CNN regularly. *Id.* Nearly four in ten victims watched television talk shows, such as "Oprah" or "Geraldo," at least sometimes, with comparable numbers listening to call-in radio shows. *Id.* Almost all victims (90%) reported hearing or reading about companies that take advantage of people by selling them worthless products or services, or by tricking them into giving money for nothing. *Id.*

4. Demographics

Survey participants were more affluent and better educated than other people fifty and older. Almost all victims owned their own homes, and nearly a third had a college degree. *Id.* at 7. Slightly fewer than one-half of the victims (43%) had annual household incomes of $30,000 or more, compared with just over one-third (38%) of all adults 50 and older. *Id.* Forty-three percent had assets, excluding home equity, of at least $50,000, and 28% reported assets of at least $100,000. *Id.* Survey interviewers gave victims high scores for their articulateness and comprehension. In assessments completed after each interview, they said 73% of victims had no trouble answering survey questions, 72% had no difficulty understanding the questions, and 50% had an excellent ability to think and reason clearly. *Id.*

5. Contacts with telemarketers

The Survey also questioned victims about their contact with telemarketers, and found they were "besieged" by them. *Id.* at 9. Almost half (46%) of the fraud victims had received a telemarketing solicitation within the week preceding the interview, and 8% had been called that day. *Id.* Four in ten (42%) said they received twenty or more calls during the prior six months from telemarketers who asked for a charitable contribution, tried to sell them something, or talked to them about a sweepstakes or contest. *Id.* Among victims aged fifty to sixty-four, 49% of men and 48% of

women reported receiving twenty or more solicitations in the prior month. *Id.*

Quite surprisingly, older telemarketing fraud victims said they did not like phone solicitations, tried to avoid them, and viewed them with skepticism. Two thirds (68%) said that when a telemarketer called they tried to get off the phone as quickly as possible. *Id.* at 10. Still, one fourth (28%) said they usually listened to what the caller had to say. *Id.* Victims who lived alone were slightly more likely to listen to the pitch (32%) than those who lived with others (26%), and one-third (30%) of victims 75 and older said they usually listen, compared with a quarter (25%) of victims under 75. *Id.*

Eighty percent of victims said they did not enjoy getting telemarketing calls and almost all (97%) said that if they had a choice, they would reduce the number of calls they received. *Id.* at 10. Despite their behavior, almost all victims (90%) believed it was acceptable to hang up on a persistent telemarketer, and three-quarters (77%) rejected the idea that good manners compelled them to respond with a donation or purchase when a telemarketer offered to send a gift. *Id.* A majority (58%) of victims thought that most companies that sell products or services through telemarketing were trying to take advantage of consumers. *Id.* Forty-two percent of fraud victims said most organizations that call people for donations to a charity or community project were trying to take advantage of people like them, the same percent said this happened sometimes, and only 11% said these organizations hardly ever tried to take advantage of people. *Id.* at 11.

6. Inability to recognize fraud

A surprising finding, given that respondents were victims, is that they generally knew what to do to avoid being defrauded by a telemarketer. When asked how a friend or relative should deal with these situations, without any prompting about possible responses, almost all victims (96%) described an action that could be effective in preventing fraud. *Id.* at 11. For example, 44% said people should just hang up on telemarketers, 9% said to ask for written confirmation of offers, and 5% said to call the authorities. *Id.* Yet, victims also said it was hard to spot fraud when it was happening.

Two-thirds (68%) said most people like them would find it hard to tell when someone was selling worthless products or services or trying to trick them into giving money for nothing. *Id.* at 17-18. The most affluent victims were most in doubt about how to tell honest pitches from fraudulent ones. Three-quarters (73%) of victims with at least $20,000 in assets, compared with 60% of victims with fewer assets, said telemarketing fraud was hard to detect. *Id.* at 18.

7. Reluctance to seek assistance or advice

Victims had trouble recognizing deceptive practices and finding effective strategies for rejecting strangers' requests for money. These difficulties were exacerbated by their reluctance to seek advice or assistance about financial matters. Almost half (47%) the victims said they never asked friends or family members for advice or help with problems; 79% did not seek advice with respect to managing money; 58% with understanding official documents; and 55% with decisions about buying products and services. *Id.* at 21. While seventy-five percent of victims who had sent money as part of a sweepstakes said they were not pleased with the outcome, *id.* at 22, almost half (47%) of those who said they were unhappy about how the sweepstakes turned out did not complain, discuss the situation, or try to get help once they realized they had been defrauded. *Id.*

8. Types of telemarketing fraud victims

In order to better understand the motivations of telemarketing fraud victims, a segmentation analysis[4/] was conducted, revealing five types of victims: "Open to Anything" (37%); "You Can't Fool Me" (30%); "Polite and Vulnerable" (14%); "Likes to Buy" (11%); and "Naive" (8%). *Id.* at 23. The attitudes and behaviors that characterize each of these groups are discussed below.

"Open to Anything" -- The largest group, its members were very social and, while skeptical about telemarketers, would

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[4/] The methodology used for this analysis is described in the Survey Appendix at 40.

participate in a sweepstakes if it did not cost a lot. Most members of this group of fraud victims attended religious institutions regularly and attended weekly meetings of a club or social group, and approximately one-half did volunteer work on a weekly basis. These victims admitted that they were confused about telemarketing fraud. Of this group, 81% said it was hard to know when a telemarketer was trying to take advantage of someone, compared with 61% of other victims. *Id.* Perhaps as a result, they were quite wary of sweepstakes (82% think they are scams) and more likely than other victims to resist sweepstakes that required a purchase, payment, or donation. *Id.* When they did participate, it was more likely to be a low-cost contest. *Id.*

"You Can't Fool Me" -- Members of this group of fraud victims were extremely wary of telemarketers and determined to ignore their mail and telephone pitches. Yet, they also were resistant to the advice and help of other people. In addition, they were quite isolated and private: they had more limited weekly activities than other groups, and sought advice less often than other groups when they had a problem or needed to make a purchase decision. A majority of this group believed that organizations that telephone to ask for donations, that contact people about sweepstakes, and that sell products over the phone mostly are trying to take advantage of people. *Id.* at 24. About one-third (32%) thought it was easy to figure out when a scam was occurring, 85% tried to get telemarketers off the phone as quickly as possible, and 87% did not enjoy getting these calls at all. *Id.*

"Polite and Vulnerable" -- Members of this group of fraud victims had difficulty rejecting telemarketers. They were more likely than those in other groups to have suffered a recent trauma, which might have made them more receptive to a stranger's call. One-half (51%) of this group, compared with 24% of other groups, said they usually listened to telemarketers' pitches, rather than trying to get them off the phone quickly. *Id.* Also, 22% said it is not okay to hang up on a salesperson who ignored them when they said they were not interested in making a purchase, compared with only 6% of other victims. *Id.* Moreover, almost three-fourths (73%) of this group said that good manners compelled them to buy something or make a donation to someone who offered gifts or sent a gift in the mail, as opposed to only 2% of other victims. *Id.* Paradoxically,

members of this group were more likely than those in any other group to say it is easy to spot fraud. *Id.* at 24-25.

"Likes to Buy" -- This group consisted of people who were more likely than other fraud victims to be open to sales pitches and to participate in sweepstakes that required sending money, even large amounts. Their eagerness to buy and spend was coupled with confusion, making them particularly vulnerable to fraud. Two-thirds (67%) of this group listened to telemarketers' offers, compared with only 23% of other victims, and more than one-half (55%) usually read their mail about product offers and contests (compared with 29% of other victims). *Id.* at 25. Members of this group admitted their confusion about fraud, with 88% saying it was hard to spot when it was happening. *Id.*

"Naive" -- This group was distinguished by the victims' failure to perceive different types of telemarketers as out to take advantage of people like them, and their belief that they never have been victimized by fraud. Only 22% of these fraud victims thought that most sweepstakes offered by phone are scams, only 10% were skeptical of most people selling products by phone, and just 5% were wary of most callers seeking charitable donations. *Id.* Many people in this group were unaware of instances in which people were defrauded by buying worthless products or giving money to a scam artist. Particularly striking is the fact that people in this group did not even recognize their own victimization -- 62% said they have never had any experience where they felt they were the subject of a major swindle or fraud, compared with 17% of other victims who denied their own victimization. *Id.*

The results of this research showed that there is no easy explanation of why people fall for fraudulent telemarketing schemes. What emerges fairly clearly from the research, however, is that people have a great deal of difficulty differentiating between a fraudulent and a legitimate telemarketing pitch.

CONCLUSION

AARP's research debunked many of the theories about why older people are particularly vulnerable to telemarketing fraud. It does not, however, diminish the fact that fraudulent telemarketers specifically target them and that they fall for the scams. Nor does it change the fact that older people are particularly hard hit by this fraud, because they have fewer opportunities and a shorter time period than younger victims within which to recoup their losses. If one fact clearly emerged from the research, it is that older victims find it extremely difficult, if not impossible, to distinguish between fraudulent and legitimate pitches.

The Court has recognized that the government has a legitimate interest in protecting the public and charities from fraud and that "[f]raudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly." *Village of Schaumberg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980), *see also Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 792 (1988). AARP respectfully submits that the Illinois courts erred in preventing the Petitioner from pursuing a fraud action to fulfill this interest.

December 24, 2002

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THE PEOPLE OF THE STATE OF ILLINOIS
ex rel. JAMES E. RYAN, ATTORNEY GENERAL
OF THE STATE OF ILLINOIS,

Petitioner,

v.

TELEMARKETING ASSOCIATES, INC.,
RICHARD TROIA and ARMET, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF *AMICI CURIAE* OF THE COUNCIL OF BETTER BUSINESS BUREAUS, INC. AND THE BBB WISE GIVING ALLIANCE IN SUPPORT OF PETITIONER

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Consent to File

Consent to file this Brief *Amici Curiae* has been obtained from Petitioner and Respondents.

Interest of *Amici*[1]

The Council of Better Business Bureaus, Inc. (CBBB) is the non-profit "umbrella" organization for the 142 Better Business Bureaus throughout the United States and Canada. Supported by approximately 300,000 business members throughout North America, the BBB system is celebrating its 90th anniversary this year. It is widely regarded as the preeminent business-funded consumer protection and business self-regulation organization in North America. The Better Business Bureau (BBB) mission is "to promote and foster the highest ethical relationship between business and the public…."

The BBB Wise Giving Alliance (WGA) is a non-profit affiliate of CBBB, formed two years ago through a merger of the National Charities Information Bureau (NCIB)[2] and the CBBB's own Philanthropic Advisory Service (PAS). WGA's mission is to help donors make informed giving decisions.

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[1] Neither party's counsel authored any portion of this brief. No person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief.

[2] NCIB was founded in New York in 1918 as the National Information Bureau (NIB) in response to the proliferation of World War I relief agencies and other war-related appeals. It was the first organization in the country to establish accountability standards for national charities and produce reports about individual charities stating whether or not the charities met those standards.

WGA is supported by individual donors, foundations, businesses and CBBB.

CBBB and its BBB network use a variety of tools to further our objectives. These include the establishment of voluntary codes of conduct for the business community, extensive consumer and business education and "alerts," reporting on the marketplace performance of several million businesses, and administering one of the largest out-of-court consumer dispute resolution programs in the world. For many decades the BBB system has also evaluated and reported to the public on national and local charities.[3]

The BBB system has more than 21 million instances of direct contact with consumers and donors each year. It has been our long-held view that ethical businesses and charities have an obligation to assure that their customers and contributors have accurate and complete information upon which purchase or donation decisions will be made.

WGA reports on the compliance with the *CBBB Standards for Charitable Solicitations* (hereafter *CBBB Standards*) of approximately 400 national charities, including VietNow, the charity on whose behalf Respondents solicit. WGA also

[3] Within 20 years of their creation, local BBBs were producing reports about charities in response to inquiries. In addition, BBBs issued "alerts" on questionable solicitation practices that came to their attention. Although the BBB did not evaluate charities in relation to standards at that time, the reports included much of the same program, financial and governing board information that still appears in BBB charity reports. The growth in appeals on behalf of servicemen and other affected groups after World War II placed a greater demand for charity information on the BBB system. Charity reporting in the BBB system, originally a response to the needs of businesses, became more public focused as a result of the growth of charitable solicitations through mass marketing, which prompted requests from individual donors for BBB evaluations.

publishes a quarterly magazine for donors, the *Better Business Bureau Wise Giving Guide*, with educational information and a comprehensive summary of charity evaluations, operates a web site visited by more than a million and a quarter visitors each year, and publishes many alerts and educational brochures.

Prior to the merger, NCIB and PAS shared national prominence on issues of charity accountability, fundraising practices and governance through their reviews of national charities. The consolidated organization is now the preeminent charity accountability mechanism in the nation, governed by a diverse Board consisting of leaders from the foundation, legal, Better Business Bureau, educational, and non-profit association sectors.

CBBB and WGA largely leave the briefing of the First Amendment issue in this case to the parties. Instead, we concentrate on *the donors' perspective*, which we think will illuminate these First Amendment issues and which has too often been overlooked.

This case is not solely about the power of state officials, the business needs of diverse charities and their fundraising agents, or the blending of commercial and issue-oriented speech. It is about donors, the tough choices they need to make, and whether the First Amendment may shield solicitors who keep from donors the information needed by them. We believe we can help to provide this important context for the Court's decision.

Summary of Argument

Amici believe that the First Amendment issue must be considered from the *donors'* perspective. The case is not about the extent of permissible regulation of charitable

solicitations. It is about the accuracy and completeness of information donors need to make informed giving decisions, and whether that information may be intentionally hidden from them without consequences.

Americans contribute substantial sums to charity each year. Donors come from every demographic group. Telemarketing and other direct marketing solicitations play a major role in persuading people to give.

Research conducted for WGA shows that many individuals are not confident when they decide whether to give or about whether a charity is legitimate or not, they want more information than is often made available to them, and they have difficulty finding it. However, donors are often trusting. A substantial number say they usually assume it is all right to give to a charity *unless* they have heard or read something that caused them to have doubts.

At the same time, donors have high expectations regarding charities' fundraising practices and use of donated funds. They expect and want most of their hard-earned money to be used for the charitable purposes that led them to give in the first place, and they want little spent on fundraising.

The commercial fundraisers in this case have contracted to be paid on a commission basis, retaining 83-90% of the amounts raised during the 10-year period of this litigation. According to WGA's evaluation of VietNow in 2001, the charity spent 91% of the amounts raised for fundraising, and only 3% on charitable programs. As a result of these practices and because of a failure to provide WGA other requested information about finances and governance, the charity failed to meet seven *CBBB Standards*, and could not be determined by WGA as to whether it met eight others. VietNow has one of the worst, if not the worst, performances

of all the charities reviewed by WGA under the use of funds and fundraising cost standards.

This case does not involve the regulation of charities or fundraisers. It is a civil lawsuit brought under the common law and statutory provisions applying fraud and misrepresentation principles to all businesses with no reference to any particular category of business.

Generally a fraud or deceptive practices suit requires a showing of a materially false statement or omission of a material fact, and intent that the consumer (or donor) rely on the statement. A misrepresentation or omission will be found material if the consumer/donor would have acted differently had he or she been aware of the false statement or the omission. The overall net impression of the statements is determinative as to whether there has been a misrepresentation or omission of material fact. These standards are used universally by state and federal consumer protection authorities, as well as the courts.

The allegations that Respondents sought contributions for a variety of relief programs for Vietnam veterans, in the context of donor trust, expectations about the percentage of funds that would go to the charity, and the amounts actually used for charitable purposes that were way out of line with expectations, could persuade a trier of fact that the solicitations were fraudulent. When viewed from the donors' perspective, most, if not all, of the considerations that underlay the Court's three previous solicitation cases are irrelevant in a fraud or deception civil lawsuit.

Moreover, the previous cases do not preclude allowing this case to be tried. The Court has recognized the states' interest in prosecuting charitable solicitation fraud. This case involves no across-the-board regulation of charities or their

fundraisers with respect to percentages of funds going to the charity, required permits, or compelled disclosures. Any additional disclosures that might be required in this case are necessitated by Respondents' own conduct, and are narrowly tailored to preventing fraud—they would not apply to all solicitors as a matter of course, or to any solicitations that in context are truthful and not out of line with expectations and norms.

Argument

A. The Marketplace for Donations: Who are the givers? What are their attitudes and concerns?

Americans are generous. In 2001, for example, it is estimated that individuals contributed more than $160 billion of the total $212 billion donated to charity, representing more than three-quarters of all charitable giving, *Giving USA 2002*, AAFRC Trust for Philanthropy, at 10 (hereafter "*Giving USA 2002*"), and that they contribute on average about $1600 per contributing household, *Giving and Volunteering in The United States, Executive Summary*, Independent Sector (2001) at p. 8 (hereafter "*Giving and Volunteering*"). Almost nine in ten households contribute. *BBB Wise Giving Alliance Donor Expectations Survey, Final Report, Sept. 2001*, Princeton Survey Research Associates, at 15;[4] *Giving and Volunteering* at 7. A substantial majority of those contributions were for secular organizations.[5]

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[4] The survey of 2003 adult Americans was conducted for WGA by Princeton Survey Research Associates in the spring of 2001. Hereafter cited as "*WGA/Princeton Research*." The Princeton research survey was conducted for WGA as part of its comprehensive post-merger review of the standards it applies in national charity reviews.

[5] The Princeton Survey found that 73% of households gave to secular causes, *id.* at 44; the *Giving USA 2002* survey pegged that proportion at almost 62%, *Giving USA 2002 at* 11.

The percentage of donors is high across all demographic groups, although it is higher among older people, the better educated and the more affluent. *WGA/Princeton Research* at 16. However, as might be anticipated by the extremely high percentage of givers overall, poorer households also participate in large numbers.[6] Indeed, low-income families give a higher proportion of their household incomes than more affluent families.[7]

Not surprisingly, telemarketing and direct mail solicitation for charities plays a major role in giving decisions. Close to 60% of all U.S. households were solicited in 2000. *Giving and Volunteering* at 11. People who are asked to give are more likely to give and to give more than those who give on their own. *Id* at 9.[8] Poorer and less educated citizens are frequently among those solicited.[9]

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[6] Last year, for example, more than three-quarters of households with income less than $25,000 gave, and almost 90% of those with incomes between $25,000 and $50,000 gave, at an average amount of $587 and $1,027 respectively. *Giving and Volunteering* at 7. This is consistent with the *WGA/Princeton Research* finding that 73% of households with income less than $30,000 were contributors. *WGA/Princeton Research* at 17.

[7] The average proportion of household income contributed by those contributors with incomes under $25,000 was 4.2%, compared to 3.1% for all households that contribute. *Giving and Volunteering* at 7.

[8] Those solicited gave an average of $1,945 per household, compared to $1,114 of the households not asked. *Ibid.*

[9] In 42% of households with incomes below $25,000 at least one member was solicited, and the same was true for 35% of households with the person solicited having less than a high school education. *Ibid.*

In the face of all this solicitation and giving, our research tells us that many individuals are not very confident when they decide whether to give. They want more information than they have and they do not always know where to get it. Some research findings pertinent to this case are illustrative:

- 70% say it is difficult to know whether a charity is legitimate, *id* at 17;
- 44% say it is difficult to find the information they want in making a giving decision, and those without a college education have more difficulty than college graduates, *WGA/Princeton Research* at 22;
- 50% say they would be "very likely" to get information they wanted from the charity itself, although again only 50% think that the charities provide enough information about their activities to help them decide about giving, *id* at 23;[10]
- only 32% feel very confident in their ability to evaluate charities, *id* at 17;
- those who seek out information to aid their giving want different types of information, but their highest priority is related to finances, including the percentage of donations that go to the charity's program, *id* at 20;[11] and

[10] The Better Business Bureau was the top choice among outside sources for obtaining information about charities, ahead of government agencies such as the attorneys general (42% "very likely" vs. 24% "very likely"), trailing only the charities themselves and family and friends (50% "very likely" and 47% "very likely," respectively). *Ibid.*

[11] Nearly half (48%) mentioned finances in response to an open-ended question asking them to describe in their own words the information they needed most, 20% mentioning the percent of a donation that goes for charitable programs as opposed to administration or other costs, and 28% responding more generally, referring to whether the donation is going to the proper place. After finances, information about the charity's mission

- 79% of all adults, not just the information seekers, responded to closed-end questions about their needs for informed giving by putting at the top of the list knowing what proportion of contributions goes to the charity's programs, *id* at 21.[12]

While 68% of respondents to the *WGA/Princeton Research* survey said that they ask questions or otherwise look elsewhere for information they need to make a donation decision, a finding that should be a concern to all of us is that *28% of households* say they usually *assume* it is all right to give to a charity *unless* they have heard or read something that caused them to have doubts. *Id* at 20. It would seem, then, that there is a significant proportion of our citizens who are solicited, including many of the poorer and less well educated, and who then make generous contributions based not on fact but on trusting assumptions about the charity.

In light of this research it is appropriate to ask just what *are* the expectations of donors regarding the charities that solicit their donations? There are three findings by *WGA/Princeton Research* that are most pertinent to this case:

- when asked how much of a charity's expenditures should go toward programs as opposed to administrative and fundraising costs, more than half (56%) said that *80% or more* should go to programs,

(20%), its legitimacy (13%) and whether it fills a real need (6%) were most frequently mentioned. *Ibid.*

[12] Almost eight out of ten (79%) said that how much charity spending goes towards programs as opposed to fundraising or administrative costs was very important to know, and almost as many (75%) agreed that making an annual report available with information on finances and activities was very important.

and more than eight in ten (85%) said *60% or more* of the expenditures should go to programs, *id* at 5;[13]

- consistently, 67% said that *no more than 20%* of charity spending should go for fundraising expenses, *ibid.*, and 35% would limit it to *no more than 10%, ibid;*[14] and
- 63% say they expect all or nearly all of the contributions to be used for current programs or near-term programs (rather than reserved for future needs), *id* at 10.

The picture is clear. Donors have high expectations and desires. They expect and want their hard-earned money to be used to serve the programs and activities that persuaded them to give in the first place. Yet they are often trusting and lack confidence in evaluating charity legitimacy and in obtaining the information needed to do so.

B. The Fundraisers, the Charity, and the WGA Evaluation

The corporate Respondents, Telemarketing Associates and Armet, are both commercial fundraising firms, 100% owned by the individual Respondent, who is also their president and sole director. Complaint, paras. 2-7. They have apparently solicited for VietNow under similar financial arrangements for at least the 10 years since the complaint was filed.

[13] The responses were as follows: don't know--3%; at least 50%--12%; at least 60%--8%; at least 70%--22%; at least 80%--25%; more than 80%--31%. *Ibid.*

[14] The responses were as follows: don't know--3%; no more than 10%--35%; no more than 20%--32%; no more than 30%--13%; no more than 40%--3%; no more than 50%--7%; "okay" if more than 50% goes to fundraising--7%. *Ibid.*

Allegations in the complaint and amended complaints are that for this entire period the Respondents received a commission of 83-90% of the donations received on behalf of VietNow. Complaint, para. 12; Amended Complaint, para. 67F. Commission compensation violates the ethics code of the major professional association of fundraisers. *Association of Fundraising Professionals International, Code of Ethical Principles and Standards of Professional Practice*, Paragraph 16.[15]

These complaint allegations are consistent with the information made available to WGA by VietNow in the course of its most recent evaluation of the charity in October 2001. See Appendix at A1-A7. WGA evaluates nationally-soliciting charities that generate a significant number of donor inquiries to WGA and/or local Better Business Bureaus. The national charities reviewed by WGA received more than $15 billion in contributions from all sources, representing more than 7% of all contributions to local and national charities in the United States.

The twenty-three *CBBB Standards* are broad, encompassing public accountability, governance, accuracy in solicitation,

[15] http://www.afpnet.org/content_documents/2002_AFP_Code_of_Ethics.pdf. AFP bases its position on its view that commissions violate the "private inurement" principle, i.e., no private financial gain from charitable resources. It believes that commission arrangements make the charity's long term interest secondary to the solicitor's; they jeopardize donor trust from possible undue pressure and reaction to learning that donations are commissioned; they foster self-interested conduct by solicitors without regard for donor intent; they discourage development of a cadre of capable charity volunteers; they can provide financial rewards without merit; and they may sacrifice long term donor interests for short term gain.
http://www.afpnet.org/tier3_cd.cfm?folder_id=899&content_item_id=1227 .

and use of funds. Appendix at A8-16.[16] These Standards reflect *donors'* concerns: Is the charity open and responsible? Are there disinterested people in charge? Are its appeals forthright? Are funds used prudently? To answer these questions, WGA looks at a range of documents and records: annual reports, financial statements, budgets, conflict of interest policies, and solicitations.

The Standards were developed and revised with substantial input from the non-profit sector, and generally enjoy wide support from that community as a reasonable benchmark for charity accountability. The breadth of the Standards indicates WGA's belief that there is no simple, single indicator of charity accountability.

According to the WGA report on VietNow, Appendix, A1-A7,[17] the charity for whom Respondents solicited, the charity failed to meet seven of the 23 *CBBB Standards*, *id* at A1, and WGA could not verify whether it met eight others because the charity did not furnish WGA upon its request complete information on VietNow's finances, solicitations and informational materials. *Id* at A4.[18] Of most relevance to

[16] CBBB's Standards were first developed in 1974, and later revised in 1977 and 1981, with the help of an advisory panel that included charitable organizations, corporate contributions executives, regulatory agencies, accountants and other philanthropic experts. The Standards have undergone a comprehensive revision based on the *WGA/Princeton Research* and the deliberations of a similar advisory panel. See note 24.

[17] Donors obtain WGA evaluation reports through our website, www.give.org, or by telephone or mail to WGA or local Better Business Bureaus throughout the nation, and WGA donors may obtain a comprehensive listing of the results of all of our reviews through a quarterly magazine we provide to them, the Better Business Bureau Wise Giving Guide.

[18] The standards for which compliance could not be verified pertained to matters as the truthfulness of solicitations, identification of the

this case, WGA found that the charity failed to meet several standards regarding the use of funds and fundraising practices. In particular, VietNow did not meet the standards requiring:

- that a reasonable percentage, at least 50%, of total income from all sources shall be applied to programs and activities directly related to the purposes for which the organization exists;
- that a reasonable percentage, at least 50%, of public contributions shall be applied to the programs and activities described in solicitations, in accordance with donor expectations;
- that fundraising costs shall be reasonable, not to exceed 35% of related contributions (i.e., contributions made pursuant to these solicitations); and
- that total fundraising and administrative costs shall be reasonable, not to exceed 50% of total income. *Id* at A3-A4, A11-A12.[19]

VietNow did not simply fail to meet these important standards -- it was not even close. In FY 2000 it had total income of $3,624,289 according to its IRS Form 990,[20] of

relationship of the solicitor to the charity and the programs and activities for which funds are requested, established controls over outside fundraising activities, conduct of fundraising without excessive pressure, and maintaining an active governing body.

[19] The other standards not met by VietNow also related to its finances. The charity failed to provide on request, as required, its annual report and an audited financial statement

[20] Form 990 is the annual information return required to be filed with the Internal Revenue Service by tax-exempt organizations (other than churches) with revenues exceeding $25,000.

which $3,604,348 was from direct public support. At the same time the charity's 990 shows that $3,286,348 was spent on fundraising and only $100,676 on programs. *Id* at A6-A7.

In other words, according to the charity's own filings, *only 3%* of VietNow's total income in FY 2000 was spent on programs, while *91%* was spent on fundraising, and *94%* on fundraising and administrative costs combined.[21] *Ibid.* Indeed, almost the same amount in that year was added to reserves, i.e., not used for current activities, as was spent on programs. *Ibid.* While the parties have heretofore focused on the 10-15% paid to the charity by the fundraisers, from the point of view of the donor's concerns about the ultimate uses of the donations, the fact that the charity spent on programs only about 20% of the paltry amount it received from its fundraisers is perhaps equally shocking and relevant.

[21] In the fundraising cases previously before the Court it was observed that fundraising also sometimes includes informational activities such as education and advocacy. When this is so, these education and advocacy activities would normally be shown as program expenses and not fundraising, because accounting standards allow appropriate cost allocation when there are documented joint cost activities. Because Respondents were paid on a commission basis, however, the accounting standards require *all* costs attributed to its fundraising appeals be characterized as fundraising. See AICPA, Statement of Position 98-02, Accounting for Costs of Activities of Not-for-Profit Organizations and State and Local Governmental Entities That Include Fund Raising, para. 10. The rationale for this is that in a commission situation "basing a majority of compensation on funds raised is persuasive evidence that the activity is a fund-raising activity." *Id at* para. C-14. We also note that the internal VietNow budgets provided to WGA in the course of its 1993 WGA evaluation show the expected proceeds of fundraising as a net income amount, and do not attribute any portion of the commission paid to Respondents as charitable programs.

VietNow's record is one of the worst of all the charities failing to meet either WGA's fundraising or use of funds standards.[22] Thirty-one charities (or only 10% of the 310 completed reviews) failed to meet the standard calling for no more than 35% of contributions to be spent on fundraising, and only 39 charities (or less than 13%) failed to meet the standard calling for at least 50% of total income to be spent on program activities. VietNow had the highest fundraising costs of the group, and the third lowest proportion of income spent on charitable programs.[23]

Moreover, VietNow's performance is truly an outlier when all charities reviewed by WGA are considered. Thus, the average proportion of contributions spent on fundraising for the reviewed charities was a modest 17%, and the median was only 12.6%. VietNow was the *only charity* WGA reviewed with fundraising costs exceeding 90%. Indeed, only 19 charities (or 6% of the total) had fundraising costs exceeding 50%, only 22 (7%) exceeded 40%, and only 36 (12%) exceeded 30%.

A similar overall picture emerges when charity program expenditures are analyzed. VietNow had the third lowest proportion of income spent on charitable programs. The average proportion of income spent for charitable programs for all reviewed charities was a very healthy 73%, and the median was 74% (contrasted to VietNow's 3% spent on

[22] Of the 440 charities for which WGA sought to do a review within the past two years, 192 or 62% of those that provided information met all 23 standards, 116 or 37% of those reviewed failed to meet at least one standard, an additional two could not be verified with respect to certain standards, 82 did not provide any of the requested information to WGA to allow a review, and 48 evaluations are in progress.

[23] The other two were at 1.4% and 2.6% respectively. Of these "worst three," VietNow raised the most funds from the public.

programs). Only 39 (13%) failed to meet the standard calling for program spending to amount to at least 50% of income, and only 27 (9%) spent less than 40% of income on programs.

Charity performance overall, then, is generally in reasonable accord with donor expectations. VietNow's, performance, in sharp contrast, falls far short of national charity performance that WGA observes in its reviews.[24]

In light of this performance, it is particularly pertinent that VietNow is precisely the sort of charity in which the public places trust. The research survey conducted for WGA asked respondents about thirteen different types of charities, and asked in general how much the respondents felt each type could be trusted. Veterans organizations came out third of those must trusted, behind only religious organizations and police and firefighter organizations, with 39% saying they trusted veterans organizations "a lot."[25]

[24] As mentioned, the *WGA/Princeton Research* was conducted, in part, to help WGA evaluate whether there ought to be further revisions to its standards to meet current needs. In fact, revisions have been approved by its Board and the CBBB Board, following an extensive public participation process, and are expected to be released to the public by the end of 2002 with implementation guides. There are a number of changes, but the one most pertinent to this case is the modification on the "use of funds" standard. In order to reflect more closely donor expectations as demonstrated by our research, the new standards will require charities to spend at least 65% of their total expenses on program activities. The current Standards require 50% of total *income* to be spent on programs. See Appendix, at A11.

[25] In fact, when combining the "a lot" and "somewhat" responses, veterans groups came in second, ahead of police and firefighters and only 3% behind churches and other religious organizations.

C. The Legal Framework: Fraud, Omissions and the "Trilogy"

1. Respondents' Representations That They Were Soliciting For Various Veterans' Programs Were Materially False In Light of the Very Small Amount That They Knew Would Actually Go To These Programs and the High Expectations They Knew Donors Have About How Their Donations Would Be Used

To begin with, it is important to recognize that, unlike the "charity and fundraiser regulation trilogy,"[26] this case does not concern the regulation of charities or fundraisers. No rules are invoked by the State regarding fundraising practices, the use of charitable donations, or procedures that must be used to obtain permission to solicit. Rather, this case involves a civil lawsuit brought under generally applicable common law and statutory principles of fraud, deception and misrepresentation that make no reference to any particular category of business.

The standards underlying these civil claims apply with equal force to automobile dealers, clothing retailers, online merchants, and commercial fundraisers. We think it crucial for the Court to recognize that the Respondents' alleged conduct, if proven at trial, would be the very sort of conduct that would likely get any business into serious trouble.

The Petitioner's complaint alleged that Respondents represented that a

[26] *Village of Schaumburg v. Citizens For a Better Environment*, 444 U.S. 620 (1980); *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988).

> "significant amount of each dollar donated would be paid over to VietNow for its purposes while in fact the Defendants knew that under the contracts 15 cents or less of each dollar would be available to VietNow for its purposes."

Complaint, para. 34. Further, in the June 25, 1996 Amended Complaint, the Petitioner alleged that "[t]he fact that less than 17% of the contributions would be paid over to VietNow and that more than 83% would be used for fund raising and other expenses is a material fact." Amended Complaint, para. 67G.

Petitioner also submitted "Survey Affidavits" that bear on these allegations. These affidavits describe how Respondents solicited for veterans programs such as food baskets, agent orange relief, and aid to homeless veterans, and the affidavits uniformly affirm under penalties of law that the donors would not have contributed had they been aware of the small amounts that were to be given to VietNow for its charitable programs.

Based on these and other allegations, Petitioner charged civil common law fraud[27] and violations of several Illinois statutes, including the State's consumer fraud statute,[28]

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[27] An action for common law fraud in Illinois requires proof of a knowing false statement and intended reliance by the recipient. *See, e.g.*, *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482, 496; 675 N.E.2d 584, 591 (Ill. 1996). One who by a fraudulent misrepresentation intentionally induces another to make a gift to him or a third person is also subject to liability. Restatement (Second) of Torts § 553 (1977) (hereinafter Restatement 2d Torts).

[28] The State statute provides:

which is comparable to the consumer protection laws in all 50 states. In typical circumstances these allegations would require a trial to determine if the misrepresentations were made or the omissions were in fact material as pled. There is a large body of law at the state and federal levels that provides guidance to the courts and triers of fact on these issues.

Generally, at common law, a misrepresentation or omission will be found material if the plaintiff would have acted differently had he been aware of the false statement, or if it concerned the type of information upon which he would be expected to rely when making his decision to act. *Miller v. William Chevrolet/Geo, Inc.*, 326 Ill. App. 3d 642, 649; 762 N.E.2d 1, 7 (Ill. App. 2001); See also Restatement 2d Torts § 539(2). A representation that is technically true may be fraudulent if it suggests something that is false, *In re Witt*, 145 Ill. 2d 380, 390, 583 N.E.2d 526, 531 (Ill. 1991), or omits qualifying material, *Brown v. Broadway Perryville Lumber Co.*, 156 Ill. App. 3d 16, 23, 508 N.E.2d 1170, 1175 (Ill. App. 1987), "for a half-truth is sometimes more misleading than an outright lie." *Ibid.* See also Restatement 2d Torts § 529 (a truthful statement that the maker knows or believes to be materially misleading because it is incomplete is a fraudulent misrepresentation) and comment b (the recipient is entitled to know the undisclosed facts if they are material).

> Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception fraud, false pretense, false promise, misrepresentation *or the concealment, suppression or omission of any material fact*, with the intent that others rely upon the concealment, suppression or omission of such material fact…in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby…." 815 ILCS 505/2 [emphasis supplied.]

The standard of materiality under the Illinois Consumer Fraud Act is essentially the same as under the common law. *See, e.g., Connick v. Suzuki Motor Co., supra.* In addition, that statute, like many of the "mini-FTC Acts" throughout the nation, incorporates Federal Trade Commission and federal court interpretations under the Federal Trade Commission Act, which are also instructive.[29]

The FTC will consider an advertisement or other marketing practice deceptive if there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment.[30] An omission may be deceptive where the representations made are not literally misleading but create a reasonable expectation or belief among consumers that is misleading absent the omitted disclosure. Deception Policy Statement at 175 n.4. An omission can be deceptive if the advertiser or marketer tells only half the truth and omits the rest – for example when a seller "fails to disclose qualifying information necessary to prevent one of his affirmative statements from creating a misleading impression." *International Harvester Co.*, 104 F.T.C. 949, 949, 1057 (1984); *Federal Trade Commission v. Sterling Drug, Inc.*, 317 F.2d 669, 675 (2d Cir. 1963). An omission can also be deceptive if a seller remains silent under circumstances that

[29] Section 5, 15 U.S.C. §45, declares unlawful unfair and deceptive practices in interstate commerce. In determining whether a practice is unfair or deceptive, Illinois state courts look not only at the particular practices that the Federal Trade Commission has identified as unfair or deceptive, but also more broadly at the standard the Commission employs in deciding what is an unfair or deceptive practice. *Heastie v. Community Bank*, 727 F. Supp. 1133, 1138 (N.D. Ill. 1989).

[30] Letter from James C. Miller II' to Congressman John D. Dingell (Oct. 14, 1983), appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110 (1984) (hereinafter "Deception Policy Statement").

constitute an implied but false representation – such as when representations are "based on ordinary consumer expectations" about the subject matter of the transaction. *International Harvester Co.*, 104 F.T.C. at 1058.[31]

A generous reading of the complaint, required in the context of a motion to dismiss, together with appropriate regard for the contributions marketplace in which the solicitations by Respondents occurred, strongly demonstrates that the representations made in this case were misrepresentations under common law and the deceptive practice statute. Thus, as discussed above, the solicitations here have occurred in an environment where many donors are trusting, and expect that *most of their contribution* will benefit the charitable activities they wish to support. At the same time, the commission-based contracts that were used to distribute the collected funds provided only a small fraction of donations to the charity, an amount that falls *woefully short* of both donor expectations *and* industry practices and ethical standards. Respondents surely and intentionally created a false but reasonable expectation by donors about their support for the charitable programs of VietNow.

[31] The BBB Code of Advertising, a voluntary standard widely followed by the business community and often used as a model for state and federal guidelines, similarly provides that "An advertisement as a whole may be misleading although every sentence separately considered is literally true. Misrepresentation may result not only from direct statements but by omitting or obscuring a material fact." http://www.bbb.org/advertising/adcode.asp#Basic%20Principles, para. 3. The *CBBB Standards* also provide that charities must "[e]nsure that solicitations and informational materials, distributed by any means, are accurate, truthful and not misleading, both in whole or in part." Appendix , at A12.

2. The Considerations Regarding the Impact of Regulation On Charitable Solicitation Underlying Schaumburg, Munson and Riley Are Not Relevant to This Civil Fraud Lawsuit

When the issues are viewed from the donors' vantage point, most, if not all, of the considerations that led to the "trilogy" decisions become irrelevant in a fraud or deceptive practices lawsuit.

For example, while it is true that donors expect that *some* portion of their contributions will be used to pay the cost of solicitation, *Riley* 487 U.S. at 799, it is not reasonable to expect that they would ever imagine that it would be 91%. Clearly, statements made in the solicitations here created reasonable expectations by donors that significant portions of their donations would benefit the charitable programs. Respondents *knew that these expectations were not to be fulfilled*, yet they remained silent, thereby maintaining the false impression they created. A trier of fact might therefore reasonably conclude that the donations to benefit specific veterans relief programs were induced by misrepresentations, or at least the intentional withholding of information that surely would have made a difference to the donors in making their decisions to contribute.

In this regard, this Court and the Illinois Supreme Court have observed that it would be wrong to assume that fundraising companies accomplish no charitable purposes with the proceeds they retained. *See Munson*, 476 U.S. at 963; *Schaumburg*, 444 U.S. at 635; *Riley*, 487 U.S. at 798-99; *People ex rel. Ryan v. Telemarketing Associates, Inc.*, 198 Ill. 2d 345, 359-60; 763 N.E.2d 289, 297-98 (2001). However, whatever might be the situation in other arrangements, and notwithstanding the contract terms in this case, according to the information provided to the IRS and

additional information provided to WGA, VietNow did not claim that *any* of the fundraising expenses were devoted to program activities. *See supra* at 14.

In any event, the amounts *actually* used for charitable programs by this charity, either directly or through the efforts of respondents, is a question of fact that goes to the issue of materiality, i.e., were the representations or omissions truly out of step with donor expectations? Materiality questions are properly determined at trial, with Petitioner shouldering the burden of proof, and not resolved on a motion to dismiss on First Amendment grounds.

The Court previously has also observed that a compelled unfavorable disclosure would have the "predictable result" of making the solicitation unsuccessful because the donor would close the door or hang up. *Riley*, 487 U.S. at 800. In the context of a fraud prosecution, however, and looking at the situation from the donors' point of view, this possibility loses its relevance.

If, indeed, a disclosure is needed to make the remainder of the solicitation truthful, it should be of no consequence that the donor might terminate the conversation. Materiality is determined by what reasonably matters to the recipient of the solicitation or other marketing call, see *supra* at 19-21, and does not depend on the recipient having a viewpoint favorable to the marketer. As we have seen, it is very likely that the amounts going for charitable programs are so marginal in this case that they would indeed have mattered a great deal to most of the donors who have difficult choices to make as to where they wish their donations to be directed. Withholding the whole truth in order to keep the prospect alive is surely not an acceptable alternative, and is not one ever previously held to be sanctioned by the First Amendment.

Nor is it relevant that in some instances the high fundraising costs may have some explanation or justification, or that the charity might actually derive some benefit from its arrangement. Donors should be able to decide for themselves, after receiving all material information, how to allocate their donation dollars. Some donors will likely choose to support new charities or activities or unpopular causes, willing to sacrifice efficiency because of an affinity with these charitable activities. Others might prefer to stick with established charities, or proven successful ones. Still others may make decisions reflecting different values in different situations. In any event the choice must be the donors', based on accurate information, and not the State's, the charity's, the fundraisers', or the courts'.[32]

It is also not an answer, in this case, to say that donors can always *ask* how much will go to the charity or how high fundraising costs may be. *See Riley*, 487 U.S. at 799. Many donors are likely to be unsophisticated and even intimidated by the telemarketer, or may be embarrassed to ask such probing questions of a charity representative, and will not ask. The very nature of a telemarketing call is that it provides little opportunity for reflection and analysis. We also know that many are trusting.

As importantly, however, donor expectations may make many donors feel that asking is irrelevant. Donors may not want to draw fine lines as to allocation percentages in making giving decisions, so long as the charity's situation is

[32] Similarly, that VietNow might like the deal it negotiated, compare *Riley*, 487 U.S. at 798, is not important or even relevant to a donor. The relevant question is whether accurate information would have affected the donors' contribution decisions, and not whether the charity might benefit from its arrangement with Respondents.

within an acceptable range. Donation decisions are, after all, based on a large number of factors, including the charity's mission and its accomplishments. It is only when the allocation is far out of line that the information becomes material, and may need to be disclosed to withstand a fraud charge.

3. Prior Cases Do Not Bar a Trial of This Lawsuit

We do not believe that any of the previous charitable solicitation cases, including *Riley*, requires that the First Amendment be an absolute bar to a trial of the fraud allegations in this case.

First, each of the Court's prior cases recognized that the states have a legitimate interest in prosecuting fraud by charitable solicitors. *Riley*, 487 U.S. at 800; *Village of Schaumburg*, 444 U.S. at 637-38; *Munson* 467 U.S. at 967. Of course, fraud and other false statements have never been protected by the First Amendment. *See, e.g., McIntyre v. Ohio Elections Comm'n.*, 514 U.S. 334, 357 (1995). "Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (citation omitted). False representations that arise from the context, whether or not they flow from specific false statements of facts, similarly do not enjoy First Amendment "immunity." *See, e.g., Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990); *Levinsky's, Inc. v. Wal-Mart Stores*, 127 F.3d 122, 127 (1st. Cir. 1997); *Toney v. WCCO TV*, 85 F.3d 383, 387 (8th Cir. 1996).

Second, as noted, charitable solicitations are not being regulated in this case. There is no prohibition of solicitation based on the percentage remaining for charitable uses, no

license or permit required, and no compelled disclosure.[33] Fundraising business practices are not jeopardized by standards that require only truth telling, and that means the whole truth.

For example, across-the-board regulation has been seen as an impediment to legitimate practices such as acquisition mailings, i.e., appeals made to individuals who are not previous donors, which often have a low return after costs but a positive long-term payoff. *See Riley*, 487 U.S. at 792. Similarly, it has been argued that such regulation might inadvertently punish unsuccessful appeals made in good faith or new or unpopular charities with high fundraising costs. *Id* at 799. Neither of these arguments is pertinent to this case.

Again, there is no universally applicable regulation at issue in this case and the cause here is one of the most popular. *See supra* at 16. In addition, the proportion made available to VietNow for the causes for which the solicitations were made is fixed by contract and does not vary by the success or lack of success for the appeal.[34] This is a far different situation than a particular appeal by a charity that turns out unsuccessful for any number of legitimate reasons, or where the costs of a particular appeal are known in advance to be high but the total funds available to support charitable programs overall are well within reasonable donor

[33] WGA similarly has not asked charities to make routine disclosures of fundraising costs or the percentage of donations used for programs. WGA believes that such disclosure on a routine basis would be unnecessary, and where the percentages are below donor expectations as reflected in our standards, the charity would fail to meet our standards in any event.

[34] Those contracts have remained in place for at least a decade without significant revision to reflect any changing circumstances for the charity and its donors.

expectations. In such situations, representations that donations would benefit charitable activities would be materially accurate and not subject to fraud actions.

Third, the disclosures that might be required in this case to prevent *actual* fraud do not have the reach of the regulatory requirements in *Riley*. Unlike in *Riley*, they are not required of all solicitors, routinely, but *only* in an individual case where the failure of the solicitor to make the disclosure would render other statements misleading under all of the circumstances. Charities and fundraisers whose practices are not so out of line with donor expectations and the marketplace need fear no burden on their rights to solicit.

Fourth, the information intentionally withheld from donors in this case--information that should have been disclosed to provide the whole truth-- is *precisely related* to the very solicitation in question. It involves the very donation being sought, for the charity in question, and not some overbroad proxy designed to protect against possible fraud. Contrast *Riley*, 487 U.S. at 800, n.12.[35]

In the end, this is really a rather straightforward fraud and deception case. The Petitioner is not, as the states were in the "trilogy" cases, exercising an interest to protect charities and donors from potential harms that might *possibly* be visited on them by *some* over-reaching solicitors. Nor is the Petitioner using blunt proxies to ferret out those potential harms at the expense of First Amendment rights of non-

[35] In *Riley* the disclosure required of all professional fundraisers before the appeal was made was the percentage of charitable contributions collected during the previous year that were turned over to charity. As the Chief Justice noted, that information was "only a very rough surrogate for the percentage of collections which will be turned over by the fundraiser in the particular drive in question." *Id* at 811 (Rehnquist, dissenting). Here, the information concealed was about the very drive in question.

fraudulent fundraisers. Petitioner is simply seeking to enjoin fraud perpetrated against donors that the facts show to have occurred in solicitations by the Respondents. This must be the Court's focus as it applies First Amendment principles.

Conclusion

The judgment below should be reversed, and the case remanded for trial.

Respectfully submitted,

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BBB Wise Giving Alliance
Charity Report

VietNow ***October 2001***
1835 Broadway
Rockford, IL 61104-5409
815-227-5100
800-837-8669
www.vietnow.com Expiration Date: October 2003

Year, State Incorporated: 1984, Illinois
Affiliates: 21 chapters
Stated Purpose: "to be a veterans organization of past and present members of the United States Armed Forces, to keep the lines of communication open to all individuals of the organization and their families, to promote awareness of all veterans' issues."

EVALUATION CONCLUSIONS

VietNow does not meet the following 7 CBBB Standard(s) for Charitable Solicitations:

A1 -- Soliciting organizations shall provide on request an annual report. The annual report, an annually-updated written account, shall present the organization's purposes; descriptions of overall programs, activities, and accomplishments; eligibility to receive deductible contributions; information about the governing body and structure; and information about financial activities and financial position.

The Alliance requested, but did not receive, a current annual report from VietNow.

A2 -- Soliciting organizations shall provide on request complete annual financial statements. The financial statements shall present the overall financial activities and financial position of the organization, shall be prepared in accordance with generally accepted accounting principles and reporting practices, and shall include the auditor's or treasurer's report, notes and any supplementary schedules. When total annual income exceeds $100,000, the financial statements shall be audited in accordance with generally accepted auditing standards.

In response to a request by the Alliance for a copy of VietNow's audited financial statements, the organization provided a copy of its fiscal year 2000 IRS Form 990, which, among other things, has not been audited by an independent certified public accountant.

A3 -- Soliciting organizations' financial statements shall present adequate information to serve as a basis for informed decisions. Information needed as a basis for informed decisions generally includes, but is not limited to: a) significant categories of contributions and other income; b) expenses reported in categories corresponding to the descriptions of major programs and activities contained in the annual report, solicitations, and other informational materials; c) a detailed schedule of expenses by natural classification (e.g., salaries, employee benefits, occupancy, postage, etc.), presenting the natural expenses incurred for each major program and supporting activity; d) accurate presentation of all fund raising and administrative costs; and e) when a significant activity combines fund raising and one or more other purposes (e.g., door-to-door canvassing combining fund raising and social advocacy, or television broadcasts combining fund raising and religious ministry, or a direct mail campaign combining fund

raising and public education), the financial statements shall specify the total cost of the multi-purpose activity and the basis for allocating its costs.

In response to the Alliance's request for a copy of VietNow's most current audited financial statements, VietNow provided a copy of its IRS Form 990 for the fiscal year ended June 30, 2000.

VietNow's IRS Form 990 for the fiscal year ended June 30, 2000, did not present expenses incurred for each of VietNow's major programs (i.e., public awareness and education, advocacy, and veterans assistance). In addition, it did not include a detailed schedule of expenses by natural classification (e.g., salaries, postage, etc.), presenting the natural expenses incurred for each program service and supporting activity (i.e., fund raising and administration).

B1 -- A reasonable percentage, at least 50%, of total income from all sources shall be applied to programs and activities directly related to the purposes for which the organization exists.

According to its IRS Form 990 for the fiscal year ended June 30, 2000, VietNow spent $100,676, or 3%, of its total income ($3,624,289) on program expenses.

B2 -- A reasonable percentage, at least 50%, of public contributions shall be applied to the programs and activities described in solicitations, in accordance with donor expectations.

According to its IRS Form 990 for the fiscal year ended June 30, 2000, VietNow spent $100,676, or 3%, of its total public contributions ($3,610,574) on the programs and activities described in its solicitations.

B3 -- Fund raising costs shall be reasonable, not to exceed 35% of related contributions.

According to its IRS Form 990 for the fiscal year ended

June 30, 2000, VietNow's fund raising costs were $3,286,348, or 91%, of related contributions ($3,610,574). (Related contributions are donations received as a result of fund raising activities).

B4 -- Total fund raising and administrative costs shall be reasonable, not to exceed 50% of total income.

According to its IRS Form 990 for the fiscal year ended June 30, 2000, VietNow's total fund raising and administrative costs were $3,395,979, or 94%, of total income ($3,624,289).

In addition, the BBB Wise Giving Alliance requested, but did not receive, complete information on VietNow's finances, solicitations and informational materials, fund raising practices, and governance, and therefore, is unable to verify VietNow's compliance with the following 8 CBBB Standards for Charitable Solicitations (see [Appendix at A8] for description of standards): A4, C1, C3, C4, D1, D2, D4, and E2.

VietNow meets the remaining 8 CBBB Standards for Charitable Solicitations.

PROGRAMS

VietNow is a membership organization extended to those veterans serving in the United States armed forces since 1957. Members participate in awareness activities and advocacy which address veteran issues such as POW/MIA's, harmful affects of Agent Orange, and homeless veterans. The organization also lobbies legislators to reduce spending cuts in veteran's benefits. Members volunteer in VA hospitals and try to block VA spending reductions. VietNow also offers programs assisting veterans suffering from Post

Traumatic Stress Disorder. In addition, VietNow works to uncover more information on the affects of the Gulf War Illness.

For the fiscal year ended June 30, 2000, VietNow's program expenses were:

Program services	100,676
Total Program Expenses	**$100,676**

GOVERNANCE

Chief Executive Officer: Rich Sanders, President
Compensation*: $0
Highest Paid Executive: Not provided
Compensation*: Not provided
Chair of the Board: Rich Sanders
Chair's Profession / Business Affiliation: Not provided
Board Size: 8
Paid Staff Size: 1
* July 1, 1999 - June 30, 2000; compensation includes annual salary and, if applicable, benefit plans, expense accounts, and other allowances.

FUND RAISING

Method(s) used: Telemarketing and Internet appeals.
Fund raising costs were 91% of related contributions. (Related contributions, which totaled $3,610,574, are donations received as a result of fund raising activities.)

TAX STATUS

This organization is tax-exempt as a veterans organization under section 501(c)(19) of the Internal Revenue Code. It is

eligible to receive tax-deductible donations for federal income tax purposes.

FINANCIAL

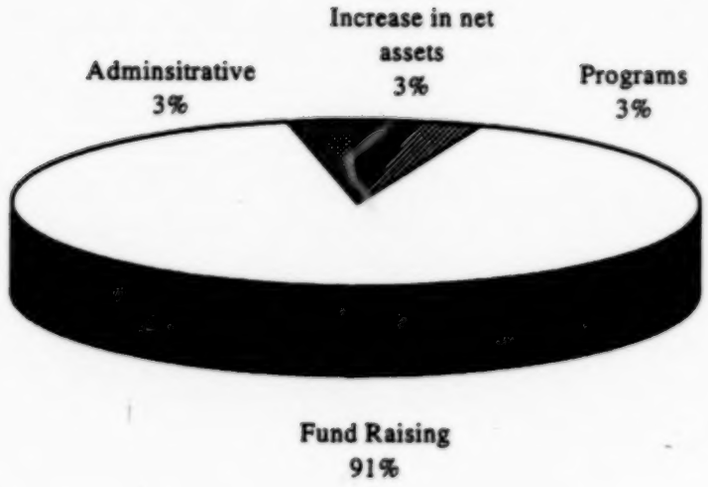
The following information is based on VietNow's IRS Form 990 for the fiscal year ended June 30, 2000:

Source of Funds

Direct public support	3,604,348
Other revenue	7,641
Membership dues and assessments	6,226
Interest on savings and temporary cash investments	3,860
Gross sales of inventory	2,214
Total Income	**$3,624,289**

Uses of Funds as a % of Total Income

This pie chart reflects the CBBB Standards addressing the use of funds which, in part, seek to identify how total income from all sources was applied by the charity. The item titled Increase in Net Assets shows the portion of income remaining after expenses.



Total Income	$3,624,289
Program Expenses	100,676
Fund Raising Expenses	3,286,348
Administrative Expenses	109,631
Total Expenses	($3,496,655)
Income in Excess of Expenses	127,634
Beginning Net Assets	382,876
Ending Net Assets	510,510
Total Liabilities	67,027
Total Assets	$577,537

Detailed information is on file with the BBB Wise Giving Alliance. An organization may change its practices at any time without notice. Donors must decide for themselves the significance of any variation from the CBBB Standards, taking into account the relative importance of the practice in question in the context of the organization's total performance.

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CBBB Standards for Charitable Solicitations

Introduction

The Council of Better Business Bureaus promulgates these standards to promote ethical practices by philanthropic organizations. The Council of Better Business Bureaus believes that adherence to these standards by soliciting organizations will inspire public confidence, further the growth of public participation in philanthropy, and advance the objectives of responsible private initiative and self-regulation.

Both the public and soliciting organizations will benefit from voluntary disclosure of an organization's activities, finances, fund raising practices, and governance - information that donors and prospective donors will reasonably wish to consider.

These standards apply to publicly soliciting organizations that are tax exempt under section 501(c)(3) of the Internal Revenue Code, and to other organizations conducting charitable solicitations.

While the Council of Better Business Bureaus and its member Better Business Bureaus generally do not report on schools, colleges, or churches soliciting within their congregations, they encourage all soliciting organizations to adhere to these standards. These standards were developed with professional and technical assistance from representatives of soliciting organizations, professional fund raising firms and associations, the accounting profession, corporate contributions officers, regulatory agencies, and the Better Business Bureau system. The Council of Better

Business Bureaus is solely responsible for the contents of these standards.

For The Purpose of These Standards:

1. "Charitable solicitations" (or "solicitations") is any direct or indirect request for money, property, credit, volunteer service or other thing of value, to be given now or on a deferred basis, on the representation that it will be used for charitable, educational, religious, benevolent, patriotic, civic, or other philanthropic purposes. Solicitations include invitations to voting membership and appeals to voting members when a contribution is a principal requirement for membership.

2. "Soliciting organizations" (or "organizations") is any corporation, trust, group, partnership or individual engaged in a charitable solicitation; a "solicitor" is anyone engaged in a charitable solicitation.

3. The "public" includes individuals, groups, associations, corporations, foundations, institutions, and/or government agencies.

4. "Fund raising" includes a charitable solicitation; the activities, representations and materials which are an integral part of the planning, creation, production and communication of the solicitation; and the collection of the money, property, or other thing of value requested. Fund raising includes but is not limited to donor acquisition and renewal, development, fund or resource development, member or membership development, and contract or grant procurement.

PUBLIC ACCOUNTABILITY

A1. Soliciting organizations shall provide on request an annual report.
The annual report, an annually-updated written account, shall present the organization's purposes; description of overall programs, activities and accomplishments; eligibility to receive deductible contributions; information about the governing body and structure; and information about financial activities and financial position.

A2. Soliciting organizations shall provide on request complete annual financial statements.
The financial statements shall present the overall financial activities and financial position of the organization, shall be prepared in accordance with generally accepted accounting principles and reporting practices, and shall include the auditor's or treasurer's report, notes and any supplementary schedules. When total annual income exceeds $100,000, the financial statements shall be audited in accordance with generally accepted auditing standards.

A3. Soliciting organizations' financial statements shall present adequate information to serve as a basis for informed decisions.
Information needed as a basis for informed decisions generally includes but is not limited to: a) significant categories of contributions and other income; b) expenses reported in categories corresponding to the descriptions of major programs and activities contained in the annual report, solicitations, and other informational materials; c) a detailed schedule of expenses by natural classification (e.g., salaries, employee benefits, occupancy, postage, etc.), presenting the natural expenses incurred for each major program and supporting activity; d) accurate presentation of all fund raising and administrative costs; and e) when a significant

activity combines fund raising and one or more other purposes (e.g., door-to-door canvassing combining fund raising and religious ministry, or a direct mail campaign combining fund raising and public education), the financial statements shall specify the total cost of the multi-purpose activity and the basis for allocating its costs.

A4. Organizations receiving a substantial portion of their income through the fund raising activities of controlled or affiliated entities shall provide on request an accounting of all income received by and fund raising costs incurred by such entities.
Such entities include committees, branches or chapters which are controlled by or affiliated with the benefiting organization and for which a primary activity is raising funds to support the programs of the benefiting organization.

USE OF FUNDS

B1. A reasonable percentage of total income from all sources shall be applied to programs and activities directly related to the purposes for which the organization exists.
A reasonable percentage requires that at least 50% of total income from all sources be spent on programs and activities directly related to the organization's purposes.

B2. A reasonable percentage of public contributions shall be applied to the programs and activities described in solicitations, in accordance with donor expectations.
A reasonable percentage requires that at least 50% of public contributions be spent on the programs and activities described in solicitations, in accordance with donor expectations;

B3. Fund raising costs shall be reasonable.

A reasonable use of funds requires that fund raising costs not exceed 35% of related contributions.

B4. Total fund raising and administrative costs shall be reasonable.
A reasonable use of funds requires that total fund raising and administrative costs not exceed 50% of total income.

An organization which does not meet one or more of these percentage limitations may provide evidence to demonstrate that its use of funds is reasonable. The higher fund raising and administrative costs of a newly created organization, donor restrictions on the use of funds, exceptional bequests, a stigma associated with a cause, and environment or political events beyond an organization's control are among the factors which may result in costs that are reasonable although they do not meet these percentage limitations.

B5. Soliciting organizations shall substantiate on request their application of funds, in accordance with donor expectations, to the programs and activities described in solicitations.

B6. Soliciting organizations shall establish and exercise adequate controls over disbursements.

SOLICITATIONS & INFORMATIONAL MATERIALS

C1. Solicitations and informational materials, distributed by any means, shall be accurate, truthful and not misleading, both in whole and in part.

C2. Soliciting organizations shall substantiate on request that solicitations and informational materials, distributed by any means, are accurate, truthful and not misleading, in whole and in part.

C3. Solicitations shall include a clear description of the programs and activities for which funds are requested.
Solicitations which describe an issue, problem, need or event, but which do not clearly describe the programs or activities for which funds are requested will not meet this standard. Solicitations in which time or space restrictions apply shall identify a source from which written information is available.

C4. Direct contact solicitations, including personal and telephone appeals, shall identify a) the solicitor and his/her relationship to the benefiting organization, b) the benefiting organization or cause and c) the programs and activities for which funds are requested.

C5. Solicitations in conjunction with the sale of goods, services or admissions shall identify at the point of solicitation a) the benefiting organization, b) a source from which written information is available and c) the actual or anticipated portion of the sales or admission price to benefit the charitable organization or cause.

FUND RAISING PRACTICES

D1. Soliciting organizations shall establish and exercise controls over fund raising activities conducted for their benefit by staff, volunteers, consultants, contractors, and controlled or affiliated entities, including commitment to writing of all fund raising contracts and agreements.

D2. Soliciting organizations shall establish and exercise adequate controls over contributions.

D3. Soliciting organizations shall honor donor requests for confidentiality and shall not publicize the identity of

donors without prior written permission.
Donor requests for confidentiality include but are not limited to requests that one's name not be used, exchanged, rented or sold.

D4. Fund raising shall be conducted without excessive pressure.
Excessive pressure in fund raising includes, but is not limited to, solicitations in the guise of invoices; harassment; intimidation or coercion, such as threats of public disclosure or economic retaliation; failure to inform recipients of unordered items that they are under no obligation to pay for or return; and strongly emotional appeals which distort the organization's activities or beneficiaries.

GOVERNANCE

E1. Soliciting organizations shall have an adequate governing structure.
Soliciting organizations shall have and operate in accordance with governing instruments (charter, articles of incorporation, bylaws, etc.) which set forth the organization's basic goals and purposes, and which define the organizational structure. The governing instruments shall define the body having final responsibility for and authority over the organization's policies and programs (including authority to amend the governing instruments), as well as any subordinate bodies to which specific responsibilities may be delegated.

An organization's governing structure shall be inadequate if any policy-making decisions of the governing body (board) or committee of board members having interim policy-making authority (executive committee) are made by fewer than three persons.

E2. Soliciting organizations shall have an active governing body.
An active governing body (board) exercises responsibility in establishing policies, retaining qualified executive leadership, and overseeing that leadership.

An active board meets formally at least three times annually, with meetings evenly spaced over the course of the year, and with a majority of the members in attendance (in person or by proxy) on average.

Because the public reasonably expects board members to participate personally in policy decisions, the governing body is not active, and a roster of board members may be misleading, if a majority of the board members attend no formal board meetings in person over the course of a year.

If the full board meets only once annually, there shall be at least two additional, evenly spaced meetings during the year of an executive committee of board members having interim policy-making authority, with a majority of its members present in person, on average.

E3. Soliciting organizations shall have an independent governing body.
Organizations whose directly and/or indirectly compensated board members constitute more than one-fifth (20%) of the total voting membership of the board or of the executive committee will not meet this standard. (The ordained clergy of a publicly soliciting church's policy-making governing body are excepted from this 20% limitation, although they may be salaried by or receive support or sustenance from the church.)

E4. Soliciting organizations shall have an independent governing body.

Organizations engaged in transactions in which board members have material conflicting interests resulting from any relationship or business affiliation will not meet this standard.

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Supreme Court, U.S.
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No. 01-1806

In the Supreme Court of the United States

JAMES E. RYAN, ATTORNEY GENERAL OF ILLINOIS,
PETITIONER

v.

TELEMARKETING ASSOCIATES, INC., ET AL.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the First Amendment precludes a State from pursuing a fraud action against a professional fundraiser who intentionally misleads potential donors by misrepresenting how charitable donations will be used.

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In the Supreme Court of the United States

No. 01-1806

JAMES E. RYAN, ATTORNEY GENERAL OF ILLINOIS,
PETITIONER

v.

TELEMARKETING ASSOCIATES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION

This case concerns the extent to which the First Amendment limits the government's authority to curtail fraudulent solicitations of charitable contributions. The United States has a substantial interest in that issue. The United States prosecutes fraudulent charitable solicitation under its criminal antifraud statutes. See, *e.g.*, 18 U.S.C. 1341 (mail fraud); 18 U.S.C. 1343 (wire fraud). Defendants convicted of those offenses in connection with telemarketing to solicit charitable donations are subject to enhanced penalties. See 18 U.S.C. 2325 (as amended by Pub. L. No. 107-56, § 1011(d), 115 Stat. 396); 18 U.S.C. 2326. The Federal Trade Commission (FTC) seeks civil redress for fraudulent charitable

fundraising under the FTC Act, 15 U.S.C. 45, which prohibits "unfair or deceptive acts or practices in or affecting commerce," and the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6102, which requires the FTC to prescribe rules prohibiting deceptive or abusive telemarketing acts or practices, including those involving charitable solicitation. 15 U.S.C. 6106(4) (as amended by Pub. L. No. 107-56, § 1011(b)(3), 115 Stat. 396). Those rules prohibit the misrepresentation "directly or indirectly" of "the purpose for which any charitable contribution will be used" or "the percentage or amount of any charitable contribution that will go to a charitable organization or to any particular charitable program after any administrative or fundraising expenses are deducted." 16 C.F.R. 310.3(d)(3) and (4) (approved Dec. 13, 2002) *available at* <http://www.ftc.gov/os/ 2002/12/tsrfinal rule.pdf>.

STATEMENT

1. Respondents Telemarketing Associates, Inc., and Armet, Inc., are professional, for-profit fundraising corporations incorporated in Illinois. Amended Complaint (Am. Compl.) ¶¶ 2, 5, 22, 24. Respondents were retained by VietNow National Headquarters (VietNow), a charitable non-profit corporation, to solicit charitable contributions to aid Vietnam veterans. *Id.* ¶¶ 8-10. Their agreements with VietNow provided that respondents would retain 85% of the gross receipts from donors within Illinois, leaving VietNow with 15%. *Id.* ¶ 11, Group Exh. B. Respondents also brokered fundraising contracts between VietNow and third-party fundraisers in other States, under which those third parties retained 70% to 80% of gross receipts from donors outside of Illinois, respondents received 10% to 20% as a "finder" fee, and VietNow received 10%. *Id.* ¶ 12, Group Exh. C. Between 1987 and 1995, respondents collected $7.1 million from persons wishing to support VietNow's charitable activities and distributed approximately $1.1 million

(slightly less than 15%) to VietNow. *Id.* ¶¶ 10, 48. VietNow allegedly spent only about three percent of the gross amounts collected by respondents to provide charitable services to veterans. Pet. 2 & n.1.

In 1991, the Attorney General of Illinois filed a state court lawsuit against respondents that asserts common law and statutory claims for fraud and breach of fiduciary duty. Pet. App. 3-4.[1] Among other things, the amended complaint alleges that respondents engaged in fraud by intentionally misleading potential donors about the uses to which their donations would be put. More specifically, the complaint alleges that respondents "made telephone solicitations on behalf of Vietnow" in which they "represent[ed] to members of the public that the funds donated would go to further Vietnow's charitable purposes." Am. Compl. ¶ 29; see *id.* ¶ 63. Donors were told contributions would be used to help Vietnam War and other veterans, including the homeless and those suffering from combat-related injuries and illnesses.[2] They were specifically told contributions would be used to provide direct assistance, including job training, rehabilitation, food, and assistance with rent and other bills.[3]

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[1] In addition to common law fraud and breach of fiduciary duty, the amended complaint alleges violations of the Illinois Solicitation for Charity Act (formerly the Charitable Solicitation Act), 225 Ill. Comp. Stat. Ann. 460/1 (West 1998); the Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. Ann. 505/1 (West 1999); and the Uniform Deceptive Trade Practices Act, 815 Ill. Comp. Stat. Ann. 510/1 (West 1999). See Am. Compl. ¶¶ 1, 23, 51-52, 56, 58-59, 76.

[2] See, *e.g.*, Am. Compl. Group Exh. H at C000327 ("Vietnam veterans in need"); *id.* at C000332 ("Vietnam veterans who were injured"); *id.* at C000333 ("Vietnam vets suffering from 'Agent Orange' "); *id.* at C000336 ("other veterans such as the homeless").

[3] See, *e.g.*, Am. Compl. Group Exh. H at C000331 (contributions to be used for providing "support[,] both physical and mental[,] as well as legal matters"); *id.* at C000339 ("food baskets, bills and rent to help physically and mentally disabled Vietnam vets and their families"); *id.* at C000340

Written materials stated that "[a] substantial portion of the proceeds will be spent on the cost of the public awareness campaign and our program service," which was described as including "Agent Orange Victim Support," "Drug/Alcohol Treatment," and "Job Training." *Id.* ¶ 30, Exh. F. In at least one instance, a donor "specifically asked" what percentage of her contribution would be used for fundraising expenses "and was told 90% or more goes to the vets." *Id.* Group Exh. H at C000358.

The complaint further alleges that respondents "did not advise donors that the campaign was being conducted pursuant to private for-profit contracts whereunder a negligible amount, or only 15%, of all funds raised would be given to Vietnow and used for its charitable purpose." Am. Compl. ¶ 37. One donor was told that her donation would not be used for "labor expenses" because "all members are volunteers." *Id.* Group Exh. H at C000329.

Based on those allegations, the complaint charges that respondents "have engaged in a course and scheme of conduct whereby representations were made that a significant amount of each dollar donated would be paid over to Vietnow for its [charitable] purposes while in fact [respondents] knew that under the contracts 15 cents or less of each dollar would be available to Vietnow for its purposes." Am. Compl. ¶ 34. The complaint also charges that, because "the amount of funds being paid over to charity was merely incidental to the fund raising effort," respondents' representations "were knowingly deceptive and materially false and were made for the private pecuniary benefit of [respondents] and their agents." *Id.* ¶ 35. See *id.* ¶ 38.

(helping "Viet. vets in Du Page [County] find jobs [and] get on their feet"); *id.* at C000346 ("job training etc."); *id.* at C000355 ("food and homeless and general assistance"); *id.* at C000358 ("rehabilitation and other services for Vietnam vets").

The complaint alleges that respondents made those false representations with the purpose of inducing members of the public to make contributions that would be largely retained by respondents. Am. Compl. ¶¶ 35, 60, 77. The complaint further alleges that donors in fact relied on respondents' misrepresentations and that, had they known how much of their donations would go to profit respondents and how little would go to support VietNow's direct assistance programs, they would not have contributed. *Id.* ¶¶ 60, 64, 74, Group Exh. H.

2. Respondents filed a motion to dismiss the complaint in which they argued that the fraud claims against them were barred by the First Amendment. Pet. App. 3. The trial court granted the motion, and the Illinois Appellate Court affirmed the dismissal. *Id.* at 19-29. The Supreme Court of Illinois affirmed the judgment of the intermediate court. *Id.* at 1-17.

The Illinois Supreme Court sought guidance from a trilogy of this Court's decisions addressing the relationship between charitable fundraising and the First Amendment: *Village of Schaumberg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980), *Secretary of State* v. *Joseph H. Munson Co.*, 467 U.S. 947 (1984), and *Riley* v. *National Federation of the Blind for North Carolina, Inc.*, 487 U.S. 781 (1988). Those cases invalidated prophylactic state and local laws that categorically prohibited charitable organizations and professional fundraisers who retained high percentages of donated funds from engaging in charitable solicitation. See Pet. App. 6-11. In addition, *Riley* invalidated a related provision that imposed a duty on all professional fundraisers to disclose, at the outset of a fundraising appeal, the average percentage of receipts that they turned over to charities during the previous year. See 487 U.S. at 786 & n.3, 795-801.

The Illinois court concluded that "the Attorney General's complaint operates to limit [respondents'] ability to engage

in solicitation * * * in a manner found constitutionally impermissible by [this] Court in *Schaumberg*, *Munson*, and *Riley*." Pet. App. 13. The Illinois court recognized that the complaint alleges that respondents' representations about the intended use of donated funds were intentionally false. *Id.* at 12-13. The court reasoned, however, that, because the falsity of the representations depends on the fact that respondents retained 85% of gross receipts, the complaint "is, in essence, an attempt to regulate [respondents'] ability to engage in a protected activity based upon a percentage-rate limitation." *Id.* at 13. In the court's view, "[t]his is the same regulatory principle that was rejected in *Schaumberg*, *Munson*, and *Riley*." *Ibid.* The court further reasoned that, under *Riley*, "fraud cannot be defined in such a way that it places on solicitors the affirmative duty to disclose to potential donors, at the point of solicitation, the net proceeds to be returned to the charity." *Id.* at 15. Finally, the court reasoned that, if petitioner were allowed to pursue these fraud claims, "all fund-raisers in this state would have the burden of defending the reasonableness of their fees, on a case-by-case basis, whenever in the Attorney General's judgment the public was being deceived * * * because the fund-raiser's fee was too high"–a prospect that "could produce a substantial chilling effect on protected speech." *Id.* at 16. The court therefore held that "the Attorney General's complaint is prohibited under first amendment principles and was properly dismissed." *Id.* at 17.

SUMMARY OF ARGUMENT

The First Amendment does not preclude the government from prohibiting fraud or prosecuting those who intentionally deceive others for monetary gain. Intentional lies distort, rather than contribute to, the marketplace of ideas, and any value they have is outweighed by society's interest in protecting those harmed by deception. It has therefore been settled, for more than 60 years, that those who extract

money through fraudulent misrepresentations are not shielded by the First Amendment–even though their misrepresentations are speech and even if they solicit in the name of charitable causes. See, *e.g.*, *Schneider* v. *State*, 308 U.S. 147, 164 (1939).

The First Amendment and prohibitions on fraud have coexisted comfortably for more than 200 years not only because fraudulent speech is itself unprotected but because the essential elements of fraud also provide sufficient breathing room for legitimate speech, including charitable solicitation. Most significant, a fundraiser may not be held liable for fraud unless it is proven that he knew or believed that his representations were false or that he acted with reckless disregard for their truth or falsity. In the libel context, essentially the same standard has been held to provide sufficient breathing room for protected speech. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 280 (1964). In a fraud action, the government must also prove that the fundraiser intended for the donating public to rely on his misrepresentations and that donors' reliance was justifiable because the misrepresentations were material. Some jurisdictions also require that fraud be alleged with particularity or that it be proved by clear and convincing evidence. To the extent that additional protection for protected speech might be necessary, special procedural mechanisms, such as independent appellate review, could provide that protection without distorting or displacing the substantive state law of fraud.

The Illinois Supreme Court lost sight of the fact that the First Amendment and prohibitions on fraud are not inconsistent. Instead, that court mistakenly held that the First Amendment creates a special immunity for fundraisers who make fraudulent representations. But prohibitions on fraud always affect speech, and there is no reason for a special immunity in the charitable solicitation context. The State's

complaint alleges that respondents intentionally misled donors by creating the false impression that a significant amount of donated funds would go to direct assistance programs operated by VietNow. The complaint also alleges that respondents intentionally created a false impression that the fundraising effort was not being undertaken for profit. Those misrepresentations are typical of the charitable solicitation frauds that the federal government prosecutes both civilly and criminally. The government's cases have involved fundraisers who collected millions of dollars for charitable programs that received only a few thousand; who collected money in a charity's name when they intended to pay the charity a fixed amount regardless of how much they raised; and who formed charities for the very purpose of carrying out fraudulent solicitation. If affirmed by this Court, the ruling of the Illinois Supreme Court would seriously impair the government's ability to prosecute such frauds and thereby to protect and to promote legitimate charitable solicitation.

The state court mistakenly concluded that this Court's decisions in *Schaumberg*, *Munson*, and *Riley* somehow preclude fraud claims based on misrepresentations of the percentage of collected funds that will go to charity or of the particular charitable purposes on which donations will be spent. *Schaumberg*, *Munson*, and *Riley* invalidated state laws that categorically prohibited solicitation by charities or fundraisers who devoted a high percentage of funds raised to administrative or fundraising costs regardless of whether those solicitors were open, silent, or deceptive about the percentage that went to charitable purposes. Nothing in those cases suggests that a misrepresentation about the percentage of donations that will go to charity cannot be the basis for a fraud prosecution. The cases hold only that the government cannot rely on that percentage to obviate the need to prosecute and to prove actual fraud. The percentage

limitations in *Schaumberg*, *Munson*, and *Riley* violated the First Amendment because they prohibited perfectly truthful charitable solicitation when fundraising costs were judged too high. Here, respondents are free to solicit even if they retain a high percentage of contributions, provided they do not intentionally mislead donors about how contributions will be used.

The Illinois Supreme Court also erred in concluding that *Riley* precludes fraud claims based on implied misrepresentations about how charitable donations will be used. The law of fraud does not distinguish between one who intentionally misleads through explicit falsehoods and one who does so through half-truths or ambiguous statements that create a false impression. In each instance, both the speaker's goal and the effect are the same–to "purposely produce[] a false impression upon [the listener's] mind." *Stewart* v. *Wyoming Cattle Ranche Co.*, 128 U.S. 383, 390 (1888). It is the intent to deceive and the resulting deception that support liability for fraud. The same intent and the same result exclude fraudulent speech from the protections of the First Amendment.

Although this Court in *Riley* declared invalid a state law that required all professional fundraisers to disclose at the outset of any solicitation the percentage of funds actually remitted to charities in the previous year, Illinois fraud law does not impose such a prophylactic rule of compelled speech. Illinois law imposes not a duty to disclose but only a duty not to intentionally mislead. Fundraisers must disclose information only when their own representations would otherwise mislead the listener.

The Illinois court also erred in concluding that *Riley* suggests that fraud claims of this type will impermissibly chill protected speech. This Court was concerned about a possible chilling effect in *Riley* primarily because the fundraiser bore the burden of proving that his fee was rea-

sonable. Here, in contrast, the government bears the burden of proving that the fundraiser's representations were fraudulent. Moreover, although the potential for liability under the statute in *Riley* was likely to cause fundraisers to cease soliciting, the potential for fraud liability is only likely to cause them to provide more complete information. That result is wholly consonant with the First Amendment.

ARGUMENT

THE FIRST AMENDMENT PERMITS FRAUD ACTIONS AGAINST PROFESSIONAL FUNDRAISERS WHO INTENTIONALLY MISLEAD POTENTIAL DONORS BY MISREPRESENTING HOW CHARITABLE DONATIONS WILL BE USED

The common law has long imposed liability on persons who make fraudulent misrepresentations for the purpose and with the effect of inducing others to act in justifiable reliance on the misrepresentations. See Restatement (Second) of Torts (Restatement) § 525 (1977); *e.g.*, *Stewart* v. *Wyoming Cattle Ranche Co.*, 128 U.S. 383 (1888). Under those longstanding principles, a misrepresentation is fraudulent if the maker knows or believes that it is false or acts with reckless disregard for its truth or falsity. Restatement, *supra*, § 526(a) & cmt. e. Actionable misrepresentations are not limited to affirmative or literal falsehoods. If a representation is capable of two understandings, one true and the other false, the representation is fraudulent if it is made with the intent that it be understood in the false sense or with reckless indifference as to how it will be understood. *Id.* § 527(a) and (c). A representation is also fraudulent if it "stat[es] the truth as far as it goes," but the maker knows it to be materially misleading because it omits additional or qualifying matter. *Id.* § 529.

Illinois fraud law reflects the same principles. A defendant is liable in damages for fraud if he makes a false

representation of a material fact; he knows the representation is false; he makes the representation with the intent to mislead the plaintiff; and the plaintiff justifiably relies upon the representation to his detriment. See *In re Witt*, 583 N.E.2d 526, 531 (Ill. 1991). Fraud includes "anything calculated to deceive, whether it be a single act or combination of circumstances, whether the suppression of truth or the suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or by silence." *People ex rel. Chicago Bar Ass'n* v. *Gilmore*, 177 N.E. 710, 717 (Ill. 1931). Consistent with Illinois law, petitioner has alleged that respondents committed fraud when they intentionally misled potential donors by misrepresenting the extent to which donated funds would be used to support VietNow's charitable programs, rather than to profit respondents. The Supreme Court of Illinois erred in holding that the First Amendment bars that fraud action.[4]

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[4] This brief focuses on the reasons that petitioner's common law fraud action is not barred by the First Amendment. Petitioner also alleges that respondents' misrepresentations violated various state antifraud statutes. See note 1, *supra*. For essentially the same reasons, liability under those statutes is also consistent with the First Amendment, at least to the extent it is premised on knowing misrepresentations made with intent to mislead. Violations of those statutes, like violations of similar statutes enforced by the FTC, do not in all circumstances require proof that misrepresentations are knowing and intentional. See, *e.g.*, *Removatron Int'l Corp.* v. *FTC*, 884 F.2d 1489, 1495 (1st Cir. 1989) (construing FTC Act); 815 Ill. Comp. Stat. Ann. 505/2 (West 1999) (in construing Illinois Consumer Fraud and Deceptive Business Practices Act, courts should give "consideration" to FTC and federal court interpretations of FTC Act). The complaint in this case, however, alleges misrepresentations that are knowing and intentional.

A. Fraudulent Speech, Including Fraudulent Chariable Solicitation, Is Not Protected By The First Amendment

1. The government's power to protect the public against fraud "has always been recognized in this country and is firmly established." *Donaldson* v. *Read Magazine*, 333 U.S. 178, 190 (1948). That power is well-established even though fraudulent misrepresentations virtually always involve speech.

The government's interest in preventing fraud is no less important and no more constitutionally problematic in the area of charitable solicitation. When a charity or fundraising organization intentionally misleads donors about the uses to which donated funds will be put, it defrauds both the donors and the causes that they are seeking to help. At the same time, when fraud leads potential donors to question the integrity and reliability of charitable solicitations, the ability of honest fundraisers to raise funds is impaired, and the charitable causes that they represent pay the price. See *Developments in the Law—Nonprofit Corporations*, 105 Harv. L. Rev. 1578, 1645, 1647 (1992) (ability of charities to raise funds is vulnerable to fluctuations in donor confidence). The prevention of fraud in the field of charitable solicitation is therefore a longstanding and important governmental interest. See *Watchtower Bible & Tract Soc'y of New York, Inc.* v. *Village of Stratton*, 122 S. Ct. 2080, 2089 (2002). Unnecessary limits on the government's ability to pursue that interest not only leave the public inadequately protected from deception but also may chill charitable giving.

The government's power to prohibit fraud and to prosecute those who commit it is not restricted by the First Amendment. Fraud is one of the "limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572 (1942). The

intentional lie belongs to "that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (quoting *Chaplinsky*, 315 U.S. at 572). Indeed, false representations affirmatively "interfere with the truth-seeking function of the marketplace of ideas." *Hustler Magazine* v. *Falwell*, 485 U.S. 46, 51 (1988).

For those reasons, it has been settled for more than 60 years that those who seek to extract money from the public through fraudulent misrepresentations are not shielded by the First Amendment. See, *e.g.*, *Schneider* v. *State*, 308 U.S. 147, 164 (1939); *Cantwell* v. *Connecticut*, 310 U.S. 296, 306 (1940); *Donaldson*, 333 U.S. at 191-192. This Court has repeatedly rejected the proposition that the First Amendment "includes a right to raise money * * * by deception of the public." *Donaldson*, 333 U.S. at 192. Instead, as the Court stated in *Schneider*, "[f]rauds may be denounced as offenses and punished by law" without thereby abridging the freedom of speech and the press. 308 U.S. at 164.

2. The government's power to prohibit fraud has coexisted with the First Amendment for more than 200 years not merely because fraudulent speech is unprotected but because the essential elements of common law fraud also provide sufficient breathing room for protected expression. Most significant is the scienter requirement. Falsity alone is not enough to subject a fundraiser to liability for fraud. Instead, the government must prove that the fundraiser knew or believed his representation was false or that he acted with reckless disregard for its truth or falsity. See pp. 10-11, *supra*. That requirement eliminates any uncertainty on the part of the fundraiser about whether his conduct is actually protected and substantially reduces the risk that a

court will mistakenly determine that it is unprotected. In other contexts, such as libel, essentially the same standard has been held to provide sufficient breathing room for protected speech. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 280 (1964); *Bose Corp.* v. *Consumers Union of the United States, Inc.*, 466 U.S. 485, 502 & n.19 (1984) (noting "kinship" between *New York Times* standard and "motivation that must be proved to support a common-law action for deceit").

Other elements of fraud law besides the scienter requirement provide additional breathing room for protected speech. For example, the plaintiff must prove that the speaker intended the listener to rely on the misrepresentation and that reliance was justified because the misrepresentation was material. Restatement, *supra*, §§ 525, 537, 538. In many States, including Illinois, fraud must be proved by clear and convincing evidence. See *Hofmann* v. *Hofmann*, 446 N.E.2d 499, 506 (Ill. 1983); cf. *Gertz*, 418 U.S. at 342 (requiring clear and convincing evidence of "actual malice" in defamation cases). And some jurisdictions require that fraud be pleaded with particularity. See, *e.g.*, Fed. R. Civ. P. 9(b).

To the extent that the risk of chilling speech remains a concern, that concern can be accommodated by special procedural mechanisms, such as independent appellate review, that leave the substantive state law of fraud undisturbed. Cf. *Bose Corp.*, 466 U.S. at 498-511 (de novo appellate review of findings regarding actual malice). What the First Amendment does not require is that a fundraiser who intentionally misleads potential donors be excused altogether from liability for fraud. Yet that is what the Illinois Supreme Court mistakenly held here.

B. Fraudulent Charitable Solicitation Frequently Involves Misrepresentations About How Contributions Will Be Used

1. In this case, the State of Illinois seeks to do precisely what this Court has repeatedly endorsed as constitutional–to sanction a charitable fundraiser for using intentional misrepresentations to defraud members of the public. Construed "in the light most favorable to" petitioner (Pet. App. 5), the complaint alleges that respondents made at least two fraudulent misrepresentations. First, they falsely represented that "a significant amount of each dollar donated would be paid over to Vietnow for its charitable purposes while in fact [respondents] knew that * * * 15 cents or less of each dollar would be available" for those purposes. Am. Compl. ¶ 34. Second, they falsely represented that "the funds donated would go to further Vietnow's charitable purposes" (*id.* ¶ 29) when the funds actually were going primarily for private profit. See *id.* ¶ 35 ("the amount of funds being paid over to charity was merely incidental to the fundraising effort" which was conducted "for the private pecuniary benefit of" respondents and their agents).

Respondents allegedly made those misrepresentations through a combination of statements, actions, and omissions. They specifically told potential donors that contributions would be used to provide direct assistance to homeless, ill, and injured veterans, including job training, rehabilitation, food, and assistance with rent and other bills. See pp. 3-4 & nn. 2-3, *supra*. Written materials stated that a "substantial portion of the proceeds will be spent on the cost of the public awareness campaign and our program service," which was described as direct assistance. Am. Compl. ¶ 30, Exh. F. In one instance, a donor was told that "90% or more" of contributions "go to the vets." *Id.* Group Exh. H at C000358. Another donor was told her donation would not be used for "labor expenses" because "all members are volunteers." *Id.*

at C000329 At the same time, respondents failed to disclose "that the campaign was being conducted pursuant to private for-profit contracts" and that "a negligible amount, or only 15%, of all funds raised would be given to VietNow and used for its charitable purpose." Am. Compl. ¶ 37.

2. Those misrepresentations are typical of the charitable solicitation frauds that the federal government prosecutes both civilly and criminally. Those prosecutions frequently involve fundraisers who mislead the public by creating false impressions about how contributions solicited in the name of charity will actually be used.

For example, in one instance, fundraisers told prospective donors that they were calling on behalf of Feed America to ask for help "with the national campaign to help Feed America." *United States* v. *Ciccone*, 219 F.3d 1078, 1081 (9th Cir. 2000). Donors were told that "[w]hat Feed America does is feed the homeless of America" and that it was "about time that we took care of our own people." *Ibid.* Of the more than $2.3 million that Feed America received, it gave less than $150,000 to legitimate charities, and the remainder "was deposited in [the owner's] personal bank account." *Ibid.* In another case, the defendant ran two charities and a telemarketing operation from his residence. *United States* v. *Cherna*, 184 F.3d 403, 405-406 (5th Cir. 1999), cert. denied, 529 U.S. 1065 (2002). The telemarketers for one of the charities told prospective donors in Massachusetts that "donations would benefit local veterans' hospitals" and "would be used to purchase medical supplies for hospitalized veterans." *Id.* at 410. In fact, the charity donated only $650 to Massachusetts veterans hospitals, and its nationwide donations totaled only one-tenth of one percent of its total income. *Ibid.*[5]

[5] See also, *e.g.*, FTC Resp. To Mot. For Judgment On The Pleadings 18, *FTC* v. *Gold*, No. CV-99-2895-CBM (C.D. Cal. filed Nov. 6, 2000) (defendants falsely represented that donations would support charitable programs when only de minimis amounts—between .01% and 3.5%—were spent on such programs).

Some fraud cases involve fundraisers who pay charities a flat fee in exchange for using the charities' names to raise money. For example, in *United States* v. *Kinney*, 211 F.3d 13 (2d Cir. 2000), a fundraiser contracted with a charity to solicit contributions in the charity's name by selling advertising space in journals. The fundraising agreement provided for $40,000 to go to the charity and the remainder to be retained by the solicitor. *Id.* at 15. The solicitation scheme raised over $200,000, the charity received only the flat fee, and no journals were produced. *Ibid.*[6]

Telemarketers sometimes form charities for the express purpose of carrying out fraudulent solicitation schemes. See, *e.g.*, *People* v. *Orange County Charitable Servs.*, 87 Cal. Rptr.2d 253, 258 (Ct. App. 1999) (describing how professional fundraiser caused business associates to form charities for the purpose of entering into fundraising contracts with them). Similarly, for-profit fundraisers sometimes use names that sound like charitable organizations and fail to disclose their for-profit status in order to mislead donors about how contributions will be used. See, *e.g.*, *id.* at 258, 260.

3. The ruling of the Supreme Court of Illinois, if affirmed by this Court, would seriously impair the government's ability to prosecute those kinds of fraud. The state court did not base its ruling on any insufficiency of the allegations in the complaint under Illinois law. Rather, the court concluded that First Amendment principles set out in three decisions by this Court—*Schaumberg*, *Munson*, and *Riley*—foreclose petitioner from pursuing the claim. The court reasoned that those cases prohibit reliance on respondents'

[6] See also Order Den. Mot. To Dismiss Counts And Granting Alternative Mot. To Strike Allegations 1, *United States* v. *Gold*, No. SACR 01-150 DOC (C.D. Cal. Feb. 25, 2002).

retention of 85% of the donated funds to establish the falsity of respondents' representation that a significant portion of donated funds would go to VietNow's direct assistance programs; that *Riley*'s invalidation of a state disclosure statute precludes a fraud action premised on the failure to disclose the percentage of donations actually delivered to VietNow; and that *Riley* indicates that fraud actions of this type impose an unjustifiable chill on protected speech. Pet. App. 13-16. Under the court's view, even if respondents knew their representations were false, intended to mislead potential donors, and did in fact mislead them, the First Amendment bars Illinois from sanctioning respondents and entitles them to continue their fraudulent conduct in the future. In so holding, the court misunderstood this Court's precedents and unjustifiably curtailed the government's ability to protect the public from fraud.

C. This Court's Precedents Do Not Preclude Fraud Actions Based On Misrepresentations That A Significant Portion Of Donations Will Be Spent On Particular Charitable Purposes

Contrary to the holding of the Illinois Supreme Court, nothing in this Court's decisions in *Schaumberg*, *Munson*, and *Riley* suggests that the government may not prosecute fraud actions that are based on misrepresentations concerning the percentage of donations that will go to charity or the particular charitable purposes for which donations will be used. The laws invalidated in those cases prohibited charitable organizations or professional fundraisers from engaging in charitable solicitation if they spent high percentages of donated funds on fundraising—whether or not any fraudulent representations were made during the fundraising. The cases therefore do not place any limitation on the kinds of fraudulent misrepresentations that the government may prohibit. Rather, they reaffirm that the government may prosecute fraudulent misrepresentations

by those who solicit funds in the name of charity provided it does so directly.

1. In *Schaumberg*, *Munson*, and *Riley*, this Court made clear that charitable solicitation implicates significant First Amendment interests and that nonfraudulent charitable solicitation is therefore protected by the First Amendment. See *Schaumberg*, 444 U.S. at 632-633; *Munson*, 467 U.S. at 959; *Riley*, 487 U.S. at 789. Consequently, when, as in those cases, the government regulates *nonfraudulent* charitable solicitation, even as a prophylaxis against fraud, the government must employ "narrowly drawn regulations designed to serve [its legitimate] interests without unnecessarily interfering with First Amendment freedoms." *Schaumberg*, 444 U.S. at 637.

In *Schaumberg*, the Court struck down as insufficiently tailored a local ordinance that categorically prohibited the solicitation of contributions by charitable organizations that used less than 75% of their receipts for "charitable purposes." See 444 U.S. at 622. Similarly, in *Munson*, the Court invalidated a state law that prohibited charities from soliciting if they used more than 25% of donations for fundraising expenses, but exempted charities that could demonstrate that the limit would effectively prevent them from raising contributions. 467 U.S. at 950-951 n.2. And, in *Riley*, the Court declared unconstitutional a state law that prohibited professional fundraisers from retaining "unreasonable" fees and used a three-tiered schedule of retention rates to determine the reasonableness of particular fee arrangements. 487 U.S. at 784-785. The three statutes suffered from the same "primary defect": rather than directly prohibiting actual fraud, "fraud [was] presumed by a surrogate and imprecise formula." *Id.* at 794 n.8. See *Schaumberg*, 444 U.S. at 636-637; *Munson*, 467 U.S. at 966-967.[7]

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[7] The Court in *Riley* also struck down a state law that required every professional fundraiser to disclose, at the outset of any solicitation, the

Schaumberg, *Munson*, and *Riley* thus establish that a State may not attack fraudulent charitable solicitation by enacting a broad prophylactic ban on activities that are not themselves fraudulent, at least when the prohibition significantly impairs the ability of charities to engage in protected speech. At the same time, however, all three cases make clear that nothing in the First Amendment prevents a State from directly pursuing actual fraud by those who solicit funds in the name of charity. Indeed, direct prohibitions on fraudulent speech were the narrowly drawn alternative against which the broader prophylactic rules were judged.

In *Schaumberg*, the Court emphasized that "[f]raudulent misrepresentations [by fundraisers] can be prohibited and the penal laws used to punish such conduct directly." 444 U.S. at 637. In *Munson*, the Court similarly stressed that "concerns about fraudulent charities[] can [be] and are accommodated directly" through "penalties for fraudulent conduct." 467 U.S. at 968 n.16. And, in *Riley*, the Court emphasized once more that States need not "sit idly by and allow their citizens to be defrauded." 487 U.S. at 795. Instead, "the State may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements." *Id.* at 800.

As the Court explained in *Schaumberg*, penalizing fraudulent misrepresentations "may help make contribution decisions more informed, while leaving to individual choice the decision whether to contribute to organizations that spend large amounts on salaries and administrative expenses." 444 U.S. at 638. Thus, rather than being constitutionally suspect, direct prohibitions on fraudulent misrepresentation are a "less intrusive," narrowly tailored, and constitutionally

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average percentage of charitable contributions that the fundraiser had turned over to the charities for which it raised money during the previous 12 months. 487 U.S. at 786. The implications of that holding are discussed at pp. 23-26, *infra*.

preferred means of furthering the government's "legitimate interest in preventing fraud." *Id.* at 637.

2. Here, petitioner is doing what the Court expressly approved in *Schaumberg*, *Munson*, and *Riley*. Petitioner is pursuing fraud directly and is holding respondents responsible only because their solicitation was knowingly and intentionally false. Petitioner is not employing a "[b]road prophylactic rule[]" (*Schaumberg*, 444 U.S. at 637) that has "no nexus * * * [to] the likelihood that the solicitation is fraudulent" (*Riley*, 487 U.S. at 793). Instead, petitioner is pursuing fraud in the most direct and "narrowly drawn" way possible (*Schaumberg*, 444 U.S. at 637)–by seeking to attach liability to fraudulent misrepresentations themselves. Petitioner's fraud claim thus falls on the constitutional side of the line drawn by the Court's cases–the line "between regulation aimed at fraud and regulation aimed at something else in the hope that it would sweep fraud in during the process." *Munson*, 467 U.S. at 969-970.

Another significant difference between the fraud claim here and the percentage limitations in *Schaumberg*, *Munson*, and *Riley* is that those laws actually prohibited truthful charitable solicitation, if the government deemed fundraising expenses excessive. Fraud law, in contrast, does not prohibit fundraisers from engaging in charitable solicitation no matter how high their expenses. As long as they do not intentionally mislead donors regarding how their contributions will be used, fundraisers who retain a high percentage of contributions are free to solicit.

Accordingly, this Court's observations in *Schaumberg*, *Munson* and *Riley* that there may be legitimate reasons for a charity's high solicitation costs or a solicitor's high rate of retained receipts do not cast any doubt on this fraud prosecution. Contra Pet. App. 13-15. No matter how high a charity's fundraising costs, or what percentage of donations are used to provide direct services, the law of fraud poses no

obstacle to fundraisers who avoid intentional misrepresentations. For example, if a charity was conducting an advertising or awareness campaign that advanced charitable purposes in conjunction with its fundraising activity, its representation that donated funds were going to "charitable purposes" would not be misleading, much less intentionally so. But here respondents are alleged to have represented not just that donated funds would be used for charitable purposes but that a substantial portion would be spent on direct assistance to veterans when they knew it would not, and to have represented that the fundraising was not for profit when they knew it was primarily for their own pecuniary benefit. Those representations are no less false because some funds may also have been used to promote public awareness or to produce advertising material.

There is no reason to exempt statements concerning fundraising costs or the intended use of donated funds from prohibitions on fraud. Donors place great importance on how their donations will be used, particularly whether they will be used for charitable programs rather than fundraising and administrative costs. See, *e.g.*, Better Business Bureau Wise Giving Alliance, *Donor Expectations Survey* 4-6 (Oct. 17, 2001) *available at* <http://www.give.org/news/Donor%20Expectations%20Survey.pdf>. The Illinois Supreme Court would appear to grant solicitors immunity even if they affirmatively misrepresent that highly material information. Indeed, the court affirmed the complaint's dismissal notwithstanding allegations that a donor "specifically asked" what percentage of her contribution would go to fundraising "and was told 90% or more goes to the vets" (Am. Compl. Group Exh. H at C000358) and that written material stated that "*[a] substantial portion of the proceeds will be spent on* the cost of the public awareness campaign and *our program service*" (*id.* Exh. F (emphasis added)).

D. Nothing in *Riley* Precludes Fraud Claims Based On Implied Misrepresentations About How Charitable Donations Will Be Used

1. Although the allegations just described could be viewed as affirmative misrepresentations, the Supreme Court of Illinois either overlooked them or determined that they did not amount to literal falsehoods. The court stated that the complaint contained "no allegation that defendants made affirmative misstatements to potential donors." Pet. App. 2. In the absence of affirmative misstatements, the court regarded imposing liability for fraud as tantamount to "plac[ing] on solicitors the affirmative duty to disclose to potential donors, at the point of solicitation, the net proceeds to be returned to the charity." *Id.* at 15. The court regarded that result as inconsistent with this Court's invalidation of the compulsory disclosure statute in *Riley*. *Id.* at 16. Contrary to that conclusion, even if the complaint were viewed as alleging no affirmative misrepresentations, its allegations would still be sufficient to bring it within the traditional contours of common law fraud and to place it outside the boundaries of the First Amendment.

The common law of fraud draws no distinction between one who intentionally misleads through explicit misrepresentations and one who does so through implicit misrepresentations or ambiguous representations calculated to produce misunderstanding. See pp. 10-11, *supra*. In each instance, both the speaker's goal and the effect are the same–to "purposely produce[] a false impression upon [the listener's] mind." *Stewart*, 128 U.S. at 390. In each instance, "the deception may often be as base, and the injury to others as great." *Hays* v. *Meyers*, 107 S.W. 287, 288 (Ky. 1908). It is the intent to deceive and the resulting deception that support liability for fraud. And it is the same intent and the same result that deprive fraudulent misrepresentation of

protection under the First Amendment, whether the misrepresentation is express or implied.

Contrary to the Illinois court's belief, *Riley* does not require a different result. In addition to invalidating the percentage limitation discussed above, the Court in *Riley* also struck down a related provision that required every professional fundraiser to disclose, at the outset of any solicitation, the average percentage of charitable contributions that the fundraiser had turned over to the charities for which it raised money during the previous 12 months. 487 U.S. at 786. The Court characterized that provision as a "prophylactic rule of compelled speech, applicable to all professional solicitations," and subjected it to "exacting First Amendment scrutiny." *Id.* at 798. The Court invalidated the law because it was an "imprecise" "burdensome rule," and "more benign and narrowly tailored options" were available to serve the State's goal of preventing donors from being misled. *Id.* at 800. Among the "narrowly tailored options" identified by the Court was the State's ability to "vigorously enforce its antifraud laws" against charitable solicitors who "obtain[] money on false pretenses or by making false statements." *Ibid.*

It is one thing to compel every fundraiser to disclose certain information, but it is quite another to treat the failure to disclose that information, when it is accompanied by other affirmative statements and misrepresentations, as the basis for a fraud claim. The former is an over-inclusive requirement that compels speech by even the most scrupulous fundraiser; the latter is a narrowly tailored prohibition that applies only to fundraisers who intentionally mislead. The Court's invalidation of the over-inclusive disclosure rule in *Riley* thus does not call into question petitioner's ability to prosecute respondents for purposely creating a false impression that a significant percentage of donations would go to specific charitable programs by, among other things, failing

to disclose that, in fact, only about 3% of gross donations would be devoted to those purposes.

In contrast to the disclosure law in *Riley*, Illinois fraud law imposes not a duty to disclose, but only a duty not to intentionally mislead. Common law fraud requires charitable solicitors like respondents to disclose information only when their own words–here, respondents' representations that contributions would be used for particular charitable programs–would otherwise mislead the listener, and where they intend or foresee that the listener will be misled. See Restatement, *supra*, §§ 527(a)-(c), 529, 551(2)(b). There is nothing constitutionally invidious about a rule of liability that compels someone to provide information, if at all, only when his own words would otherwise "purposely produce[] a false impression upon [the listener's] mind" (*Stewart*, 128 U.S. at 390). Freedom of speech may well "compris[e] the decision of both what to say and what *not* to say" (*Riley*, 487 U.S. at 797), but it does not comprise the right to use ambiguities and half-truths in order to deceive.

To the extent that petitioner's complaint alleges that respondents committed fraud by misleading donors into believing that contributions would not go to profit respondents, there can be no question that the complaint is permissible under *Riley*. The misimpression that the fundraising was not a profit-making enterprise could have been cured if respondents had disclosed their professional, for-profit status. And the *Riley* opinion expressly states that a disclosure requirement of that nature is constitutional. See 487 U.S. at 799 n.11.

Riley thus does not limit fraud in the area of charitable solicitation to literal and express falsehoods. Such a limitation would seriously impair the government's ability to protect the donating public from deception. There would be no recourse against a fundraiser who asserted that he was collecting money "to feed the homeless" but intended to use

only one penny out of every hundred dollar donation for that purpose and to use the rest for personal luxury items. Nor could the government take action against a fundraiser who informed donors that he was collecting money for a particular charity when he intended to give the charity a fixed dollar amount from the proceeds regardless of how much he actually collected. The government also would be barred from pursuing fraud actions against fundraisers who incorporate charities for the very purpose of contracting with them to solicit contributions, the lion's share of which will go for the fundraisers' personal profit. The First Amendment does not require that the government countenance such "shabby attempt[s] to get the benefit of a fraud, without incurring the responsibility." *Smith* v. *Chadwick*, 9 App. Cas. 187, 201 (1884) (Lord Blackburn) (appeal taken from Eng. C.A.).

2. *Riley* also does not suggest that a prosecution like the one in this case unjustifiably chills protected speech. Relying on *Riley*, the Supreme Court of Illinois expressed concerned that, if a State could pursue claims of fraud like the one here, protected speech would suffer "a substantial chilling effect" because fundraisers "would have the burden of defending the reasonableness of their fees, on a case-by-case basis, whenever in the Attorney General's judgment the public was being deceived * * * because the fundraiser's fee was too high." Pet. App. 16. Direct prosecutions of fraud do not, however, present the same chilling effects that this Court identified in *Riley*.

This Court's concern in *Riley* that case-by-case litigation about the "reasonableness" of fundraising fees would "chill speech" arose primarily because the statute there placed the burden of proof on the fundraiser. 487 U.S. at 793-794. The Court has frequently concluded that, to avoid chilling protected speech, the government must bear the burden of proving that the speech it seeks to prohibit is unprotected.

See *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965); *Speiser* v. *Randall*, 357 U.S. 513, 525-526 (1958). But the government *does* bear the burden of proof in a fraud action.

In addition, the statute in *Riley* posed a particular risk of chilling speech because liability did not depend on the truthfulness of the solicitor's representations. The only way to avoid the risk of litigation was to cease soliciting. Here, in contrast, liability for fraud depends entirely on the truth of the solicitor's representations. Accordingly, a solicitor can avoid liability by avoiding misrepresentations and providing enough information to ensure that his representations are not misleading. As a result, the potential for fraud liability should not lead individuals to cease soliciting, but rather should result in more speech rather than less.[8]

That result is entirely consonant with the First Amendment, for it furthers the public interest in receiving "truthful information about a matter of public significance." *Smith* v. *Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979). And, if informed members of the public decide, after hearing a fundraiser's solicitation, that they would prefer to direct their charitable donations elsewhere, that too is consistent with First Amendment values. See *Schaumberg*, 444 U.S. at 637-638.

As discussed above, the essential elements of common law fraud themselves provide sufficient breathing room for protected speech, including charitable solicitation, and any further protection that may be necessary can be provided by additional procedural safeguards such as independent appellate review. See pp. 13-14, *supra*. The Illinois Supreme

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[8] Moreover, the statute in *Riley* imposed a distinct chilling effect on charitable solicitation. The law of fraud, by contrast, imposes no more chilling effect on charitable solicitation than on any other form of speech that can be used for legitimate purposes or misused for fraudulent purposes. The law of fraud has never been thought to chill speech impermissibly by creating an incentive to avoid fraudulent statements.

Court mistakenly concluded that those protections are insufficient. Instead, the court restricted the scope of fraud to affirmative misstatements or claims where the falsity of a solicitor's representations is not proved by the amount of donated funds he retains. As the Court has held in the libel context, however, such substantive limits on the concept of falsity are not necessary to protect First Amendment values. Thus, the Court has held that the First Amendment does not preclude a libel action based on an expression of opinion that implies a false statement of fact. *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 18-21 (1990). And the Court has "reject[ed] any special test of falsity for quotations." *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496, 516 (1991). Similarly, no special test for falsity is warranted here.[9]

[9] Rather, falsity is determined by "the effect [that the representations] would produce, under the circumstances, upon the ordinary mind." See W. Page Keeton, *Prosser and Keeton on The Law of Torts* 736 (5th ed. Hornbook Series Law. ed. 1984). One well-accepted method of establishing the effect that representations have on the general public's understanding is a methodologically sound survey. See *Kraft, Inc.* v. *FTC*, 970 F.2d 311, 318 (7th Cir. 1992), cert. denied, 507 U.S. 909 (1993). Expert opinion testimony, and, to a more limited extent, consumer testimony may also be relevant. See *id.* at 318.

CONCLUSION

The judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted.

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No. 01-1806

In The
Supreme Court of the United States

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, ATTORNEY GENERAL OF THE STATE OF ILLINOIS,

Petitioner,

v.

TELEMARKETING ASSOCIATES, INC., RICHARD TROIA, AND ARMET, INC.,

Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

BRIEF OF THE STATES OF FLORIDA, ALABAMA, ALASKA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, GEORGIA, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH DAKOTA, OHIO, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA WASHINGTON, WEST VIRGINIA, WYOMING, THE DISTRICT OF COLUMBIA, AND THE COMMONWEALTH OF PUERTO RICO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI*

The essence of the question presented by this case is whether States may bring prosecutions for fraud against persons who obtain charitable donations by misrepresenting the specific uses to which those donations will be put. The *amici* are 40 States, the District of Columbia, and the Commonwealth of Puerto Rico (the "*amici* States"), that believe the answer to this question is yes and that the decision of the Supreme Court of Illinois in *Ryan v. Telemarketing Associates, Inc.*, 763 N.E. 2d 289 (Ill. 2001), should accordingly be reversed.

The *amici* States are witnesses to a troubling development in the world of charitable solicitations. Individuals are using "charitable" fundraising as a "cover" for converting charitable donations to personal funds. These individuals include professional fundraisers, and, in some cases, directors and officers of purportedly charitable organizations themselves. All too often, these individuals invoke the First Amendment as a shield from otherwise legitimate enforcement efforts. They assert that the First Amendment fully protects their activities, as long as they provide token dollars to charitable purposes and token statements of "public awareness" to members of the donating public. *Amici* States do not mean to imply that a majority of charities are infected with this problem, but rather that the injection of fraud into the realm of charitable giving, immunized by the First Amendment, will chill charitable giving to the detriment of society as a whole.

This proceeding stands to affect two specific interests shared by the *amici* States. First, as with any situation involving fraud, the *amici* States have a strong interest in protecting their citizens from solicitations that procure donations through false pretenses regarding how donated funds will be used. This Court has previously recognized the constitutionality of States' efforts to prevent and punish fraud in the context of charitable solicitations. *See, e.g., Village of Schaumburg v. Citizens for a*

Better Environment, 444 U.S. 620, 637-38 (1980) ("Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly.").

Second, the *amici* States share a strong interest in ensuring that charitable assets are duly administered in a manner that encourages charitable donations and thereby maximizes the public benefits that may be offered by beneficent charitable organizations. Charitable contributions represent a significant public resource. They promote a wide range of important initiatives in areas such as medical and scientific research, social services, public health, education, the environment, civil rights, and legal aid. Yet these initiatives cannot succeed without popular support, and such support will come only where the public trusts that its donations will be used for purposes that donors intend to sponsor and are led to believe their donations will in fact sponsor.

SUMMARY OF ARGUMENT

The facts in *Ryan* exemplify a disturbing phenomenon: a fundraiser solicited financial contributions by leading donors to believe that donations would be used to provide specific charitable services, though the fundraiser knew an overwhelming percentage of the donated funds would never serve any such purposes. The Supreme Court of Illinois affirmed the dismissal of a fraud action against the fundraiser because, in that court's view, the fundraiser's actions were protected by the First Amendment. The court did not hold, or even suggest, that the claim brought by the Illinois attorney general was not a valid claim for fraud under state law. Rather, the decision relied solely upon this Court's First Amendment decisions to hold that the First Amendment negates an otherwise valid fraud prosecution under Illinois law. That decision was incorrect because this Court has never interpreted the First Amendment to bar an action for common law fraud and because all fundraising efforts are not entitled to the full protections of the First Amendment.

ARGUMENT

I. *RYAN* PRESENTS AN INCREASINGLY COMMON EXAMPLE OF FRAUD IN THE CONTEXT OF CHARITABLE SOLICITATION.

The facts underlying the complaint in *Ryan* are not complicated. Since 1989, and continuing through the present, Respondents contracted with VietNow to solicit funds on VietNow's behalf. The relevant contractual language obliged the fundraiser to remit to the charity only 15 percent, and in some cases only 10 percent, of the funds collected. Under the contracts, VietNow had no access to the names or addresses of its donors.

Based on these contracts, Respondents raised funds through telephone solicitors who contacted potential donors and told them that their donations would provide hungry, homeless, or injured Vietnam War veterans with food, shelter, and financial support. Donors were not told that less than 15 percent (or, in some cases, less than 10 percent) of their donations would be passed on to the charity, let alone that only part of that amount would eventually be used to support the charity's services, depending on the charity's practices. The affidavits attached to the Amended Complaint show that none of the donors would have given to VietNow had they known that so little of their charitable dollars would be applied to the described veterans programs. [J.A.107-94]

Although VietNow's contracts provided that Respondent was to "increase public awareness" of veterans' needs, the record shows that the content of the solicitation pitches delivered was *ad hoc* and not something that Respondents or VietNow prepared. (J.A. 32; 83, ¶ 67E) According to the Questionnaires, the actual solicitations on behalf of VietNow conveyed only enough information to enable the solicitor to make his pitch for money. In addition, none of the donors were told that their donation would be used for a public awareness campaign.

As the *amici* States show in the following sections, similar fund raising campaigns are increasingly common, and States must have the opportunity to pursue fraud claims where the facts warrant.

A. THE CONDUCT AT ISSUE IN *RYAN* IS INCREASINGLY PREVALENT AND THREATENS TO REDUCE THE PUBLIC BENEFITS GAINED FROM POPULAR SUPPORT OF CHARITABLE FUNDRAISING EFFORTS.

Modern solicitation efforts routinely evoke images of desperation in which persons will suffer cruel, undeserved hardships unless someone intervenes to alter that course -- intervention that will come, so the solicitor says, if donors will make the requested charitable contributions. This technique is applicable in many contexts. Potential donors may be told, for instance, that children in an area are starving and that donations will be used to provide them with life-sustaining food. Donations may be said to provide victims of abuse with care, counseling, or shelter from their abusers. Or, as in *Ryan*, solicitors may claim that donations will provide hungry, homeless, or injured Vietnam War veterans with food, shelter, and financial support. *See generally* Nicholas Barborak, *Saving the World, One Cadillac at a Time: What Can Be Done When a Religious or Charitable Organization Commits Solicitation Fraud?*, 33 AKRON L. REV. 577 (2000).

By painting a picture of the charitable works that donated funds will serve, fundraisers play directly upon the emotions of potential donors. Giving in response to such appeals is understandable, as support for persons less fortunate is a particularly noble and common human trait. Unfortunately, it is also a trait that may be exploited by those who would mislead donors about the uses intended for their contributions.

Professional fundraisers exploit the good-will of our citizens by picking the most popular charitable causes -- veterans relief, families of firefighters killed in the line of duty, terminally-ill children – and enter into contracts with charities where the fundraiser receives an exorbitant percentage of the funds collected. Not surprisingly, these fundraisers are able to raise millions of dollars nation-wide.[1]

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[1] According to New York's most recent annual report on telemarketing, paid fundraisers received $125.8 million, or 68.1%, of the $184.7 million raised in 588 telemarketing campaigns that targeted New Yorkers and others throughout the country. *See* NEW YORK STATE ATTORNEY GENERAL, PENNIES FOR CHARITY (2002), <www.oag.state.ny.us/charities/charities.html>. Of the New York campaigns, 73% resulted in payment to the fundraiser of at least 60%, and 25% resulted in the fundraisers' receiving over 80%. *Accord,* CONNECTICUT ATTORNEY GENERAL & CONSUMER PROTECTION COMMISSIONER, 2001 TELEMARKETERS REPORT, <www.cslib.org/attygenl/mainlinks/tabindex8.htm> (of $11,330,315 contributed by Connecticut residents in response to solicitations by paid telephone solicitors, $7,424,324, or 65.5%, was paid to fundraisers); COMMONWEALTH OF MASSACHUSETTS OFFICE OF THE ATTORNEY GENERAL, THE ATTORNEY GENERAL'S REPORT ON TELEMARKETING FOR CHARITY (2002), <http://www.ago.state.ma.us/charity/telrep01.pdf> (65% of all charitable contributions went to paid fundraisers; of 445 campaigns, 48% involved payment to fundraiser of over 70% of contributions, and 24% involved payment to fundraiser of over 90% of contributions); NORTH CAROLINA DEPT. OF SECRETARY OF STATE, ANNUAL REPORT OF THE CHARITABLE SOLICITATION LICENSING SECTION (2001), <www.secretary.state.nc.us/CSL/reports.asp#> ($66,554,046 raised in 437 campaigns, of which paid fundraisers retained $39,815,490 or 60% of funds contributed). A review of all fundraising campaign reports filed with the Pennsylvania Office of the Attorney General from January 1988 through December 17, 2002, shows 2,249 separate campaigns with gross contributions of $1,384,169,056; of that amount, only $631,474,266, or 45.6%, went to the charities, with the professional fundraisers retaining the

An increasing number of fundraisers are soliciting funds by touting specific services that donations will serve under circumstances where, as in *Ryan*, the fundraisers have full knowledge that an overwhelming percentage of the funds will not be used to support those services. For instance, federal officials in New York recently indicted an individual who formed a charitable organization purportedly to assist families of New York City police officers killed in the line of duty. *USA v. Justin Patrick White*, No. 02 Cr. 1111 (KTD), *Indictment* at ¶ 1 (S.D.N.Y. filed Aug. 19, 2002). He hired telemarketers who solicited donations by expressly inviting potential donors to ease the hardships on surviving widows and children through financial contributions, knowing that less than five percent of the funds collected would be used in that manner. *Id.* at ¶ 26. In fact, the telemarketers' script sheets told them to end calls quickly once a potential donor asked about the percentage of contributions provided to the widows and children because, the supposed charity presumed, persons with such knowledge would have no interest in donating funds. *Id.* at ¶ 13.

The Vermont Attorney General recently settled a charities fraud dispute involving three charities and a fundraiser who solicited donations on the charities' behalf. The fundraiser had represented to potential donors that money was being raised for particular services -- such as to provide urgent pain medication to critically ill cancer patients, to help local paralyzed veterans, and to provide medical equipment for local disabled children -- but, in addition to other concerns, the fundraiser kept between 84 and 91 percent of all donations, and with respect to one supposed service, no money whatsoever was used in its support. Consent Decree and Stipulation, *State of Vermont v. Civic Development Group et al.*, No. 863- 98CnC (Chittenden Super. Ct. filed Jan. 22, 2001).

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remaining 54.4%, or $752,694,740.

Similar circumstances can be seen in recently reported case law. For example, the opinion in *People v. Orange County Charitable Services*, 73 Cal. App. 4th 1054 (Cal. App. Ct. 1999), depicts the sordid tale of a individual who formed a network of charities in order to enter fundraising contracts with them and further subcontract the fundraising work to other entities. Under the contractual arrangements, the charities actually received 10 percent or less of the funds that were donated to the charities, despite the fact that donors were directly led to believe that their contributions would be spent on specific charitable services.

Charitable donors are particularly vulnerable to fraudulent misrepresentations by professional fundraisers because, in contrast to a purchase of a product or an investment, the donor does not receive anything in exchange for his or her donation. Thus, it is harder for the donor to verify the veracity of a particular solicitation. Justice Kennedy notes this situation in his concurrence to *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) where he argues that the State's interest in protecting charitable donors is greater than the State's interest in protecting the purchasers of products or services because "[t]he danger of a fraud arising from such sales is much more limited than from pure solicitation, because in the case of a sale the nature of the exchange tends to be clearer to both parties. *Id.* at 708.

With alarming frequency, persons are establishing fundraising businesses for the purpose of retaining 80 to nearly 100 percent of funds raised despite the fact that donors are led to believe that their donations will be used to help particular services performed by the charities the fundraisers purportedly seek to aid. To a somewhat lesser extent, the same is true with respect to so-called charities created for no purpose other than to serve as income sources for their creators, with nearly all donations being used for purposes other than the charitable services touted in the charities' fundraising efforts.

Citizens who have learned of these situations have begun complaining loudly for States to take action. The *amici* States have received a large number of complaints regarding solicitations to collect funds ostensibly intended to aid the victims of the September 11, 2001 terrorist attacks on the United States but which result in the fundraisers keeping substantially all of the donated funds. The Attorneys General of numerous States have begun the process of prosecuting those who mislead donors regarding the intended uses of their donations.

These complaints and prosecutions have apparently provoked the interests of the news media, which have begun to conduct independent investigations and to publicize deceptive charitable solicitation practices. For example, the front cover of a recent edition of the St. Petersburg Times ran a story entitled, "Charity 10%, firefighters union 90%." The article reported that, for the past five years, a Tampa, Florida firefighters union has used telemarketers to promote a camp for children burned by fire but spent less than 10 percent of the funds raised on that charitable service. The article begins:

> The callers ask for donations for Camp Hopetake, a summer retreat where children burned by fire get a once-a-year escape from the rest of the world. The Tampa firefighters union raises more than a half-million dollars in the name of these children every year. But most of the money doesn't go to the kids. Last year, for every $100 donated, less than $10 went to Camp Hopetake and other charities. Ninety percent went to the union.

David Karp, *Charity 10%, firefighters union 90%*, ST. PETERSBURG TIMES, at 1A (Jun. 30, 2002). The article continues with a detailed report of the union's solicitation practices, including an account of how the union's telemarketers made potential donors believe that the union's costs were below average, when in fact they were not, by emphasizing that the union did not utilize professional fundraisers. *See also*, Richard

T. Pienciak, *1.2M Raised but WTC Kin Get Zip*, NEW YORK DAILY NEWS, at 4 (Sept. 9, 2002). This article describes how only 4% of all donations received in 2001 were given out for scholarships for families of New York firefighters.

The public benefits when it learns that all charitable fundraisers are not necessarily credible regarding how donations will be used or that asking specific questions regarding the intended uses of funds is advisable by allowing individuals to avoid making contributions to finance activities they do not wish to support. At the same time, declines in the public's perception of charitable solicitors' trustworthiness play a direct role in reducing the overall amount of charitable support. *See* THE 21ST CENTURY DONOR: EMERGING TRENDS IN A CHANGING MARKET (Epsilon & Barna Research Group, Ltd., Sept. 2002); *see also* Harvey Lipman, *Survey Identifies Troubling Trends for Nonprofit Organizations*, CHRONICLE OF PHILANTHROPY, at 13 (Nov. 14, 2002).[2] The public is thus collectively harmed to the extent that this public distrust dissuades charitable giving by those who would otherwise support legitimate, beneficent charities that provide tremendous services to society at large.

In order to ensure the public's ability to rely on the representations of charitable fundraisers, and thereby to permit the public to receive the full benefits of a thriving community of

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[2] For additional survey results documenting the fragility of the public's trust in charities, *see* PRINCETON SURVEY RESEARCH ASSOCIATES, INC., BBB WISE GIVING ALLIANCE DONOR EXPECTATIONS SURVEY, FINAL REPORT (2001) ("SURVEY"), <http://www.give.org/news/Donor%20Expectations%20Survey.pdf>. According to the SURVEY, over a third of the adults polled believe that charities are less trustworthy than ten years ago (albeit a lower percentage than in 1993); 70% find it difficult to know whether a particular charity is legitimate; and three-fourths are of the opinion that at least 70% of a charity's expenditures should go toward programs as opposed to administrative and fundraising costs. *See* SURVEY at 10, 17 and 27.

charitable organizations, States must be able to hold charitable fundraisers legally responsible when they obtain donations through misrepresentations regarding how those funds will be used. Otherwise, fraudulent practices in the course of charitable fundraising will only continue to escalate, and the result will be an environment in which honest charities cannot maximize their ability to raise funds and provide charitable services, to the detriment of our entire society.

B. THE CONDUCT AT ISSUE IN *RYAN* SATISFIES THE COMMON LAW DEFINITION OF FRAUD.

If the statements allegedly made by the telemarketers in *Ryan* intentionally misled donors to believe that at least a substantial portion of their donations would actually be used to provide hungry, homeless, or injured Vietnam War veterans with food, shelter, and financial support, and if those donors relied on that understanding when they made their donations, then as asserted by the Attorney General of Illinois, the fundraiser committed fraud. The State of Illinois has given its Attorney General the authority to prosecute such conduct.

This result, under these facts, is not unique to the law of Illinois. Fraud is generally defined as a knowingly false representation of a material fact made with the intent to induce, and which does induce, another's detrimental reliance.[3] *E.g.*, 37

[3] Many jurisdictions impose liability for dishonest or misleading solicitations, but dispense with the common-law requirement of intent to defraud. *See, e.g.*, N.Y EXECUTIVE LAW §172-d(2). These laws were drafted this way in order to provide further protections to the donating public. The courts have upheld similar statutes in the consumer protection area on the theory that "defendants had created an atmosphere conducive to fraud." *People v. Compact Associates*, 22 A.D.2d 129, 131; 254 N.Y.S.2d 265, 267 (App. Div. 1964). Similar laws have been upheld by the federal courts.

AM. JUR. 2D *Fraud and Deceit* § 12 (1968); 37 C.J.S. *Fraud* §§ 2, 7 (1997); RESTATEMENT (SECOND) OF TORTS, § 525 (1977); *see also* RESTATEMENT (SECOND) OF TORTS, § 553 (defining liability for fraudulent misrepresentation inducing gift to third person). A statement's literal truth does not preclude the existence of fraud where the message taken as a whole carries a false implication of fact. 37 AM. JUR. 2D *Fraud and Deceit* § 42; 37 C.J.S. *Fraud* § 24; RESTATEMENT (SECOND) OF TORTS, § 529.

In addition to the common law claim of fraud, States have enacted statutory devices to protect the public from fraudulent activities. Statutes based on the Uniform Deceptive Trade Practices Act, adopted in a large number of States, routinely provide consumers general protection from unscrupulous business practices.[4] Many States utilize charitable solicitation regulations to prohibit fraudulent acts in the specific context of charitable fundraising.[5] Also, as in Illinois, States typically empower a state actor, such as the State's attorney general, to investigate suspected

See, e.g., FTC v. Amy Travel Service, Inc., 875 F.2d 564, 573-74 (7th Cir. 1989), *cert. denied*, 493 U.S. 954 (1989) ("[I]mposing a requirement that the FTC prove subjective intent to defraud on the part of the defendants would be inconsistent with the policies behind the FTCA and place too great a burden on the FTC.")

[4] *See, e.g.*, FLA. STAT. § 501.201 *et seq.*; DEL. CODE ANN. tit. 6, § 2511 *et seq.*; IND. CODE § 24-5-0.5-2 *et seq.*; MICH. COMP. LAWS § 445.901 *et seq.*; OHIO REV. CODE ANN. § 1345.01 *et seq.*; S.D. CODIFIED LAWS § 37-24-6.

[5] Florida's Solicitation of Contributions Act, for example, provides specific regulations regarding solicitors and is enforced by both the state's Attorney General and its Department of Agriculture and Consumer Services. FLA. STAT. Ch. 496. *See also, e.g.*, DEL. CODE ANN. tit. 6, § 2591 *et seq.*; IND. CODE § 23-7-8-7; KAN. STAT. ANN. § 17-1759 *et seq.*; MD. CODE ANN., BUS. REG. § 6-601 *et seq.*; MICH. COMP. LAWS § 400.271 *et seq.*; OHIO REV. CODE ANN. Ch. 1716; S.D. CODIFIED LAWS § 37-30-17.

fraudulent activity and, if appropriate, to initiate a suit in a *parens patriae*-type capacity for relief that may include an injunction, sanctions, or money damages.[6]

Under these common law and statutory actions, a fundraiser who tells a potential donor that his or her financial contribution will support a particular charitable service, and thereby represents that at least a substantial portion of the donation will be used in that manner, commits actionable fraud where the fundraiser knows that at least 85 or 90 percent of the funds will not be used to support those services.[7] How that portion of the donation is in fact spent is *irrelevant* once it is established that this portion will not be used to support the service promoted to the donor at the time of the solicitation.

Accordingly, the fraud prosecution undertaken by the Illinois Attorney General in *Ryan* is representative of suits that could be brought in numerous states based on the same underlying conduct. As the *amici* States show in the following section, the Supreme Court of Illinois erred in determining that the First Amendment prevents such actions.

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[6] *See, e.g.*, FLA. STAT. § 501.207; DEL. CODE ANN. tit. 6, § 2514; IND. CODE § 24-5-0.5-4; KAN. STAT. ANN. § 17-1773; MD. CODE ANN., BUS. REG. § 6-205; MICH. COMP. LAWS § 400.290; S.D. CODIFIED LAWS § 37-24-12 *et seq.*

[7] A review of VietNow's most recent form 990 tax return (for the year ended June 30, 2001), reveals that, in actuality, only 3.5% of expenses were devoted to any program activity; and only 1.4% ($48,793 of the $3,540,451 raised), was used as grants to help needy veterans. VietNow's revenues, fundraising and program expenses are reported in its IRS Form 990 for 2000, which is published by the California Attorney General on the internet at http://justice.hdcdojnet.state.ca.us/charitysr/default.asp, and summarized by the Better Business Bureau Wise Giving Alliance at http://www.give.org/reports/care2_dyn.asp

II. THE ILLINOIS SUPREME COURT INCORRECTLY HELD THAT THE FRAUDULENT ACTS CHARGED BY THE ILLINOIS ATTORNEY GENERAL ARE IMMUNIZED BY THE FIRST AMENDMENT.

In *Ryan*, the Illinois Supreme Court reached its conclusion by relying upon a trilogy of this Court's cases culminating in *Riley v. National Federation of the Blind, Inc.*, 487 U.S. 781 (1988). That reliance was misplaced, as the *Riley* trilogy involved materially different circumstances and, indeed, the Court affirmatively stated in those cases that States may prosecute fraud in the context of charitable solicitations.

Each case in the *Riley* trilogy addressed concerns that are not present in *Ryan*. The first case, *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), involved a state law that prohibited certain solicitations by any charitable organization that did not use at least 75 percent of its receipts for "charitable purposes." The second, *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), involved a similar provision, except that it exempted charities that were effectively prevented from raising contributions. In both cases, the Court held that the asserted justification for the statutes -- protecting the public from fraud -- were insufficient to overcome the charities' First Amendment right to speech. The essence of the Court's concern was the impermissibility of categorically equating fraud with a particular level of expenses, given the wide range of interests served and activities undertaken by various charities.

Riley concerned a state law that presumed the existence of fraud once a fundraiser's fees exceeded 35 percent, although the presumption could be rebutted. The law further required fundraisers to inform potential donors of the percentage of donations the fundraiser turned over to charities in the preceding 12 months. This Court held that both aspects violated the First Amendment. The presumption was invalidated because its

premise -- that use of more than 35 percent of donations towards fees alone suggested fraud -- was flawed and because noncommercial speakers should not bear the burden of rebutting a presumption that their speech is unlawful. The Court rejected the percentage disclosure because compelling that disclosure did not meaningfully inform donors about the uses that donations would serve and only applied to professional fundraisers; thus, the requirement was not narrowly tailored to meet the state's goal of disclosing how much of a donation would actually benefit a charity.

Though the *Riley* trilogy of cases invalidated statutes that spoke to how charitable donations were utilized, those cases do *not* support the proposition that the percentage of funds retained by a fundraiser is beyond examination where a fundraiser in fact represents the uses to which donations will be put. Yet it was in this sense that the Illinois Supreme Court misinterpreted this Court's precedents. The Illinois court reasoned that the fundraiser in *Ryan* would not have committed fraud had it disclosed the percentage of funds it would retain, and the court read the *Riley* trilogy to forbid States from imposing liability for the failure to disclose such information.

The Illinois Supreme Court's interpretation is unsupportable. At most, this Court's holdings preclude the use of certain percentages as a complete and independent basis for presuming fraud in charitable solicitations. By comparison, the Illinois Attorney General alleged in *Ryan* that the fundraiser had made misrepresentations regarding how donated funds would be used and that, among other things, the percentage of funds retained by the fundraiser pursuant to its contract with the charity demonstrated that the fundraiser's representations were false. Those misrepresentations, together with the specific circumstances of how donated funds were intended to be used and were in fact used, constitute additional facts that take this case far outside the circumstances at issue in *Riley*, *Munson*, and *Village of Schaumburg*.

The Illinois Supreme Court also ignored this Court's clear statements in those cases that States are free to prosecute fraud when it occurs in the context of charitable solicitations. *Village of Schaumburg* expressly stated that "[f]raudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly." 444 U.S. at 637. In *Riley*, the Court stated:

> [W]e do not suggest that States must sit idly by and allow their citizens to be defrauded. North Carolina has an antifraud law, and we presume that law enforcement officers are ready and able to enforce it.

487 U.S. at 795. In this case the Illinois Attorney General attempted to follow these pronouncements by bringing a fraud prosecution based on specific, completed events.

In holding that the *Riley* trilogy prohibited that prosecution, the Illinois Supreme Court did not find that the facts alleged by the attorney general failed to show fraud. Instead, the state court simply held that the First Amendment immunized the telemarketers against prosecution. The decision below, if upheld, would support the argument that even a major inconsistency between express or implied representations and actual use of donations is immune from challenge on grounds of fraud as long as the misrepresentations are somehow related to high fund raising costs. If this view were to prevail, nothing would prevent a paid fundraiser from telling prospective donors that their contributions will be used for denominated purposes when in fact, year after year, 85, 95 or 99 percent of those contributions are retained by the fundraiser—even if it is clear that donors were in fact mislead by the statements.

The most disturbing implication of the Illinois Supreme Court's decision is that the "fundraising cost" argument may arguably trump any evidence that a state can offer at trial. Here, for instance, the Attorney General was not allowed to introduce evidence of a number of factors relevant to the existence of fraud:

the totality of the fundraiser's representations to donors[8]; the extent to which solicitations had (or lacked) informational or persuasive content[9]; whether and how telefunders departed from prepared scripts; how the solicitation message was understood by donors[10]; and the historic relationship between the fundraiser and the officers of the charity. Yet the development of a full factual record is essential to fair consideration of any First Amendment as-applied defense such as that involved here. *See Bartnicki v. Vopper*, 532 U.S. 514, 524 (2001).

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[8] For instance, Respondents sent donors an invoice stating that a "substantial portion" of the proceeds would be spent on program service. *See* State of Illinois' Complaint, Ex. F. [R.C. 113]

[9] The court below was seemingly impressed with the fact that the fundraising contract called for a direct public awareness campaign on behalf of the charity. In light of the recognition in *Riley* that charities may reap substantial benefits from the dissemination of information, such provisions are regularly inserted in fundraising contracts. However, the inclusion of such a provision is not conclusive evidence that such a campaign is actually conducted, and the State of Illinois was not given the opportunity to document the non-existence or insignificance of such a campaign. Indeed, VietNow's IRS Form 990 for the year 2000 shows no such "program awareness" educational expense, casting doubt on the validity of the educational mission associated with the fundraising activity. *See supra*, note 7.

[10] The Illinois Attorney General offered 44 affidavits of donors who believed that they were misled into contributing. [Joint Appendix at 107-94]

III. THE DECISION BELOW REFLECTS AN IMPROPER PERCEPTION THAT ALL FUNDRAISING EFFORTS CONSIST SOLELY OF NON-COMMERCIAL, FULLY PROTECTED SPEECH UNDER THE FIRST AMENDMENT.

In considering the specific facts presented by Illinois' appeal, the Court should revisit certain assumptions underlying its decision in *Riley* and inquire into whether these have proven to be accurate in light of the experience of State regulatory and law enforcement agencies. In particular, the Court should consider whether, in some cases, paid fundraiser solicitations on behalf of charities can be sufficiently devoid of informative and persuasive content, and so directed at profiting the fundraiser, as to take on the character of commercial speech.

In *Riley*, the Court sought to protect the "legitimate efforts of professional fundraisers to raise money for the charities they represent." 487 U.S. at 799. The Court paid particular attention to "the realities faced by small or unpopular charities, which must often pay more than 35% of the gross receipts collected to the fundraiser due to the difficulty of attracting donors." 487 U.S. at 793. The Court also noted that fundraising costs may be high because a charity chooses to receive a large sum as measured by the dollars donated rather than the percentage of donations remitted, or because a campaign is "designed to sacrifice short-term gains in order to achieve long-term, collateral, or non-cash benefits." 487 U.S. at 792.

The scenarios posited by the Court do occur. However, the States have witnessed another phenomenon in the field of charitable fundraising. A significant number of campaigns regulated by the States have turned out to involve charities that are not new or discernibly unpopular, on whose behalf fundraisers have had little trouble attracting donors, but which, year after year, have contracted with professional fundraisers who retain the

lion's share of the contributions made.[11] Indeed, such campaigns

[11] State records reflect percentages to many charities that are low *year after year*. For example, the New York Attorney General has examined 87 instances in which charities paid 75% or more of their gross contributions to the same professional fundraiser in each of 5 or more years during the period 1994-2001. *See* NEW YORK STATE ATTORNEY GENERAL, PENNIES FOR CHARITY (1995-2002), <www.oag.state.ny.us/charities/charities.html>. In 48 (55.2%) of these instances, the charity paid the same or a higher fundraising percentage in the most recent year than it paid in the initial year, and in 31 (35.6%) of these instances, the charity never reduced its fundraising percentage after the first year. Similarly, in Connecticut, of 110 in-state charities and public safety organizations identified from public filings with the Connecticut Attorney General's Office that conducted fundraising campaigns in three or more years during the period 1996-2001, 59 (53.6%) paid the same or a higher fundraising percentage in the most recent year than in the initial year; and 49 (44.5%) never reduced their fundraising percentage after the first year. The following are three of many specific examples from campaign reports on file with the States: AMVETS, American Veterans of WWII, Korea and Vietnam, utilizing the same professional fundraiser, American Trade and Convention Publications, reported gross contributions for the years 1999 through 2001 of $2,758,368, $4,443,094 and $4,819,701, respectively, but received only $500,000 for each reporting period, revealing steadily *declining* receipts as a percentage of gross contributions (18.1%, 11.3% and 10.4%, respectively), in spite of the fact that gross contributions *increased* each year (on file with Office of Minnesota Attorney General); American Health Assistance Association, utilizing Public Interest Communications for the years 1999 through 2001, reported gross contributions of $261,356, $269,474, and $240,775, respectively, but receipts of only 17.7%, 2.8% and 1.7%, respectively (*id.*); Cancer Fund of America, utilizing Civic Development Group, reported gross contributions from September 2000 through September 2002 of $1,008,102, $890,549 and $1,289,908, respectively, but receipts of only 12%, 12% and 11.6%, respectively, with the lowest percentage occurring in 2002, again the year in which gross contributions were highest (on file with Office of Pennsylvania

have stood on its head the "more than 35%" figure alluded to in *Riley*, by directing to the fundraiser 85% or more of donations on a repeated basis.[12] Moreover, in many campaigns, there has been virtually no public education or advocacy, only a passing, *pro forma* reference in a script to the charity and its mission.[13]

Attorney General).

[12] *See, supra,* note 1.

[13] In general, telephone solicitation scripts begin by identifying the fundraiser and nonprofit client and end with a request for a donation. In between, something may be stated as to the organization's activities, mission, beneficiaries, etc., but in many instances, the informational and persuasive content is minimal. For example, in this respect the script for one of the fundraisers for VietNow states only, "The reason for the call is every year we help our disabled veterans in the area. VietNow helps homeless and disabled veterans in the State of Oregon and throughout the nation." Model script for Charity Services, Inc. (2001-2002) (on file with Oregon Department of Justice). Note that the script offers no explicit information regarding the plight of veterans, how an interested solicitor may help (beyond giving money), or even how the charity will assist veterans. For some of the many examples of publicly-accessible fundraising scripts that contain similarly perfunctory information, *see* Reese Brothers, Inc., on behalf of National Care Giving Foundation (2001-2003), Four Winds Marketing on behalf of Oregon Chapter of National Federation of the Blind (2001), Gatti Productions on behalf of Professional Fire Fighters of Grants Pass (2002), Legacy Telemarketing Corp. on behalf Lane County Chapter of American Red Cross (2000), and Suihkonen & Associates, Inc., on behalf of Douglas County Shrine Club (2002-2003) (all on file with Oregon Department of Justice); United Funding Organization, Inc., on behalf of Police Protective Fund (2000-2001) and Callan Publishing, Inc., on behalf of Virginia Association of Chiefs of Police (2001-2002) (both on file with Virginia Department of Agriculture & Consumer Services); All-Pro Telemarketing Associates Corp. on behalf of Children's Charity Fund (filed 2001), Fundraisers, Inc., on behalf of Coalition of Police & Sheriffs (filed 2002), TCI America,

Such fundraising campaigns raise an important issue for this Court: that of articulating the line between charitable speech to which the fundraiser's commercial involvement is ancillary—which is fully protected under the First Amendment—and commercial speech in which the charity is only a minor player. In *Riley*, the Court reasoned that the activity of professional fundraisers does not retain its commercial character when it is "inextricably intertwined" with otherwise fully protected speech. 487 U.S. at 796. There the Court declined to apply a lower degree of constitutional scrutiny to the commercial portion of the solicitation and a higher degree to the charitable portion. The Court focused instead on the *overall* character of the speech:

> Our lodestars in deciding what level of scrutiny to apply [to the compelled disclosure] must be *the nature of the speech taken as a whole* and the effect of the [mandated disclosure] thereon. . . . Regulation of a solicitation "must be undertaken with due regard for the reality that solicitation is *characteristically* intertwined with informative and perhaps persuasive speech . . ."

Id. (quoting *Schaumburg*, 444 U.S. at 632) (emphasis added).

State regulatory and law enforcement action has shed light on campaigns where the nature of the speech "taken as a whole" is arguably commercial, since year after year the solicitations have included only the barest reference to informative, much less persuasive, speech, and the vast majority of the donated dollars has gone to the fundraiser for reasons other than "getting one's message across." As the Court noted in *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 475 (1989), "communications can 'constitute commercial speech

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Inc., on behalf of North Haven Fire Fighters Assn. (filed 2002), and East Coast Marketing Group, on behalf of East Lyme Police Union (filed 2002) (all on file with Office of Connecticut Attorney General).

notwithstanding the fact that they contain discussions of important public issues'" (quoting *Bolger v. Youngs Drug Products, Inc.*, 463 U.S. 60, 67-68 (1983)). A campaign where 85 to 90 cents of every dollar contributed has gone to a paid fundraiser and the charity-related speech has been limited to a request for a contribution to support a given cause should be susceptible of being considered commercial speech for purposes of First Amendment analysis.

It should be stressed that the States seek no presumption of illegality here, no rule of thumb derived from the percentage split between fundraiser and charity. Rather, they wish to reaffirm their historic and Constitution-compatible role of protecting their citizens from fraud on a case-by-case basis. As the Court in *Riley* stressed, "we do not suggest that States must sit idly by and allow their citizens to be defrauded. [Each state] has an antifraud law, and we presume that law enforcement officers are ready and able to enforce it." 487 U.S. at 795. In undertaking such enforcement actions, however, the States need to be free to present in court all of the facts surrounding the fundraising campaign. They must have the opportunity to show that although a campaign is conducted in the name of a charitable organization, its primary and ongoing purpose is to benefit the fundraiser, with little in the way of informative or persuasive speech offered to the public; and in that case, a lower level of constitutional protection should apply. Finally, in such circumstances, depending upon the specific evidence presented, the fundraiser's unqualified representation, express or implied, that the donor's money will be used for a specific purpose—when in fact almost all of the funds will go to the fundraiser—should be sufficient to support a claim of fraud without running afoul of the First Amendment.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the decision of the Supreme Court of Illinois.

Respectfully submitted,

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In The Supreme Court of the United States

JAMES E. RYAN, ATTORNEY GENERAL OF ILLINOIS,

Petitioner,

v.

TELEMARKETING ASSOCIATES, INC., ET AL.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF *AMICI CURIAE* ON BEHALF OF ASSOCIATION OF FUNDRAISING PROFESSIONALS, ASSOCIATION OF DIRECT RESPONSE FUNDRAISING COUNSEL, COUNCIL FOR ADVANCEMENT AND SUPPORT OF EDUCATION, THE DIRECT MARKETING ASSOCIATION AND THE DIRECT MARKETING ASSOCIATION'S NONPROFIT FEDERATION, DIRECT MARKETING ASSOCIATION OF WASHINGTON, DIRECT MARKETING FUNDRAISERS ASSOCIATION, NATIONAL CATHOLIC DEVELOPMENT CONFERENCE, AND NATIONAL HEALTH COUNCIL IN SUPPORT OF RESPONDENTS

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CONSENT TO FILE

Consent to file this Brief *Amici Curiae*[1] has been obtained from Petitioner and Respondent.

INTEREST OF THE *AMICI*

Amici are "umbrella" groups representing both nonprofits and their fundraisers. Some are organizations with individual members and others are organizations which have nonprofits and/or commercial fundraising organizations as members. All are themselves nonprofit associations.

Amici range in size from the Association of Fundraising Professionals with approximately 27,000 individual members[2] to the Association of Direct Response Fundraising Counsel with fewer than fifty firms as members. These organizations have ethical guidelines for their memberships and seek to promote integrity in fundraising by a variety of methods.

Amici are more aware than most that nonprofits and fundraisers depend heavily upon public goodwill. Without goodwill, their messages could not be spread; their missions could not be advanced; they could not solicit donations based on those messages and missions. Therefore these "umbrella" organizations have a profound and steadfast interest in rooting out charitable fraud.

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[1] Neither party's counsel authored any portion of this brief nor made any monetary contribution to the preparation or submission of this brief. *Amici* provided financial support for this brief directly as well as through American Charities for Reasonable Fundraising Regulation, a nonprofit organization.

[2] The Association of Fundraising Professionals ("AFP") is the largest organization of its kind in the charitable sector. AFP has been in existence for more than 42 years and yet has never before participated in any proceeding before this Court. However, given the importance of the issues raised by Petitioner, AFP has joined the other Amici on this brief.

Amici generally support reasonable registration and reporting requirements intended to protect and inform the public. *Amici* unequivocally believe that when donors ask for financial information about a nonprofit, they are entitled to a full and honest answer. *Amici* support each Attorney General's power to prosecute fraud committed under the guise of charitable solicitation. Indeed, they wish more energy was focused on such prosecutions to rid the philanthropic sector of this element and the negative publicity that hobbles legitimate charitable solicitations.

Amici believe that state and federal regulatory officials should be free to collect information on various fundraising costs and ratios, however they may be calculated. *Amici* further believe that occasionally these data are useful in giving such regulators and prosecutors an indication of where they might wish to conduct further investigations to determine if, aside from the simple and often misleading "cost of fundraising" measure, there is evidence that fraudulent or other illegal activity is taking place such as "private inurement,"[3] "private benefit,"[4] or "excess benefit transactions."[5]

Amici do not appear here to support the specific arrangement between Respondents and VietNow or to endorse any particular form of such arrangements regardless of the method of fundraising employed.[6]

Finally, *Amici* vigorously support the Riley[7] decision because it correctly pointed out some of the pitfalls of relying on a cost of fundraising percentage or ratio ("fundraising

[3] 26 U.S.C. § 501(c)(3); 26 C.F.R. § 1.501(c)(3)-1(c)(2).
[4] 26 C.F.R. § 1.501(c)(3)-1(a)(1).
[5] *See* 26 U.S.C. § 4958 ("intermediate sanctions" legislation which imposes "excess benefits" taxes on "disqualified" persons dealing with a charity) and 26 CFR § 53.4958-7 (implementing regulations).
[6] *Amici* reserve judgment on this issue because the facts have never been fully revealed or discovered.
[7] Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988).

ratio") to root out fraud, namely: reliance on the fundraising ratio presumes that the nonprofit derives no benefit from the act of solicitation itself,[8] "donors are … undoubtedly aware that solicitations incur costs" therefore disclosure of the fundraising ratio does not necessarily advance a compelling state interest,[9] and the "compelled disclosure will almost certainly hamper the legitimate efforts of professional fundraisers to raise money for the charities they represent."[10]

Amici come before the Court to point out yet additional infirmities of the fundraising ratio and the notion that this unitary measure can alone be used as a predicate for a finding of fraud, particularly when there is no uniform, rational, objective manner by which the fundraising ratio can be calculated. No one, including no fundraising experts, government regulators, tax authorities, consumer advocates, nor Attorneys General, has defined the fundraising ratio in a uniform fashion or in such a way as to make it a useful or reliable indicia of fraud or philanthropic efficiency. This uncertainty reveals fatal constitutional flaws in Petitioner's theory.

Because *Amici* represent legitimate and ethical nonprofits and fundraisers, they are not only intimately familiar with the practical realities of charitable fundraising and the methodological difficulties of calculating the fundraising ratio, they are also the parties whose constitutional rights will be most directly encumbered by a fraud prosecution theory premised on the fundraising ratio.

SUMMARY OF ARGUMENT

Petitioner's relief should not be granted because there is no universal, rational, objective definition of the

[8] Riley, 487 U.S. at 798.
[9] Riley, 487 U.S. at 799.
[10] Riley, 487 U.S. at 799.

fundraising ratio that has any value as an indicator of fraud or even of efficiency in fundraising once it is calculated.

In theory the fundraising ratio is an attractive device for evaluating charitable operations and fundraising. It is deceptively simple and convenient to those who have a "one size fits all" view of how one might evaluate the work of nonprofits and charitable fundraising. However, in practice it is not a reliable assessment of a nonprofit's effectiveness or integrity. Rather, it is an invitation, at a minimum, to confusion and error and, at worst, to manipulate data for illegitimate ends all disguised as an invitingly simple percentage figure. In the hands of those with the power to prosecute fraud, the fundraising ratio can be influenced through a variety of means, including the selection of the time period under consideration, the selection of particular fundraising campaigns to evaluate, the characterization of expenses, and the treatment of funds devoted to reserves, amongst other means.

By relying solely on the fundraising ratio as an indicator of and the premise for a finding of fraud, Petitioner seeks to vest too much discretion in the state by deciding how the fundraising ratio will be calculated and by deciding whom to prosecute once it is calculated, which can be essentially the same question. This Court has already ruled that the fundraising ratio has little value as an indicator of fraud.[11]

In this Brief, *Amici* will expand upon that reasoning as an incident to their primary argument: If Petitioner can arbitrarily and after-the-fact decide how the fundraising ratio should be calculated in his jurisdiction, then every other law enforcement authority has the same discretion to subject the entire nonprofit community to a complicated welter of conflicting regulations in violation of the Commerce Clause while at the same time significantly chilling communications

[11] Riley, 487 U.S. at 793.

between nonprofits and the public in violation of the First Amendment and subjecting charities and fundraisers to significant violations of their due process rights.

ARGUMENT

I. The fundraising ratio has deceptive significance

Reports of charitable fraud incite tremendous public outrage. In response government regulators and prosecutors as well as private sector "watchdog" organizations seek to separate the "good" nonprofits from the mismanaged nonprofits and outright scams. Both often fail to understand the complexities and unreliability of fundraising ratios.[12]

[12] The problems with using this crude measure are revealed in numerous scholarly studies of the matter. See, generally, Espinoza, Straining the Quality of Mercy: Abandoning the Quest for Informed Charitable Giving, 64 Southern California Law Review 633 (1991); Frumkin & Kim, Strategic Positioning and the Financing of Nonprofit Organizations: Is Efficiency Rewarded in the Contributions Marketplace?, 61 Public Administration Review 266-275 (2001); Greenlee & Gordon, The Impact of Professional Solicitors on Fund-Raising in Charitable Organizations, 27 Nonprofit and Voluntary Sector Quarterly 277-299 (1998); R. Rettig, Cancer Crusade: The Story of the National Cancer Act of 1971 (1977); Rose-Ackerman, Charitable Giving and "Excessive Fundraising", Quarterly Journal of Economics 97 (1982); Sargeant, Using Donor Lifetime Value to Inform Fundraising Strategy, 12 Nonprofit Management and Leadership (2001); Smallwood & Levis, The Realities of Fund-Raising Costs and Accountability, The Philanthropy Monthly (September 1977) (also found at http://www.nonprofits.org/misc/fps/realities.html); Steinberg, Should Donors Care About Fundraising? in S. Rose-Ackerman, ed., The Economics of Nonprofit Institutions 347-364 (1986); Steinberg, Economic Perspectives on Regulation of Charitable Solicitation, 39 Case Western Reserve Law Review 775 (1988); Steinberg, Profits and Incentive Compensation in Nonprofit Firms, 1 Nonprofit Management and Leadership 137-151 (Winter 1990); Steinberg, The Economics of Fundraising, in D. Burlingame & L. Hulse (Eds.), Taking Fund Raising Seriously, 239-256 (1991); Steinberg, On the Regulation of Fundraising, in D. Burlingame (Ed.), Critical Issues in Fundraising 234-246 (1997);

The "cost of fundraising" or fundraising ratio purports to be the percentage or ratio of every charitable donation raised that was spent on fundraising expenses. In other words, it seeks to reduce a nonprofit's "efficiency" to a simple percentage. Thus, fundraising ratios are attractive to the government regulators and watchdogs that calculate them according to their own rules and use them to rate nonprofits, with little or no explanation, understanding, or context.

Many potential donors do not understand the lack of scientific or economic basis inherent in fundraising ratios and thus reports of such by government agencies[13] and watchdogs may be influential. And a fundraising ratio can grievously damage a nonprofit's reputation when it is calculated without regard to the proper context.[14] Of course, these agencies and

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Titus, Heinzelmann & Boyle, Victimization of Persons by Fraud, 41 Crime and Delinquency 54-72 (1995); Watkins, Discussion on the Cyber-Accountability List-Serv, archived at cyb-acc@CharityChannel.com., #2002-140 (Aug. 24, 2002), Are ratios useful? For donors? For the community? (found at http://www.nonprofit-info.org/npofaq/11/14.html)(1996).

[13] Some state regulators publish fundraising ratio data on state managed websites. See, e.g., Kansas' "Charity Check" website http://www.kscharitycheck.org/search.asp where fundraising ratio is based upon the ratio of "fundraising expenses" to "gross receipts." See also, http://web.dos.state.pa.us/charities/dsf/explain.cgi which explains the calculation done by Pennyslvania. Charity Navigator, one of several "watchdog" groups, measures amongst other things "fundraising efficiency" based on the percentage of total contributed revenue expended on fundraising. See, http://www.charitynavigator.org/index.cfm/bay/content.view/catid/2/cpid/35.htm.

[14] Economist Richard Steinberg who has extensively studied costs of fundraising notes:

> The costs of efficient fundraising are highly idiosyncratic, varying with organizational age, mission, press coverage, competition from other fundseekers, scale, experience, perceived levels of need, the economic well-being of potential donors and a variety of other factors [citations omitted]. Charities situated in favorable fundraising environments may be highly inefficient and still secure low fundraising shares,

watchdogs enjoy First Amendment protections for their views.

But for decades *Amici* and their members have seen the fundraising ratio mislead the public,[15] become misused for political and public relations purposes,[16] and have generally found it to be a vexatious concept. This is primarily because there is no demonstrably rational, objective basis upon which to calculate the fundraising ratio so that it lives up to its promise of being a unitary measure of fraud or efficiency for most nonprofits under most circumstances.[17]

> whereas charities advocating unpopular causes or prospecting for new donors will have high fundraising shares (perhaps exceeding 100%) even if they operate at the limits of efficiency. Steinberg, On the Regulation of Fundraising, in D. Burlingame (ed.), Critical Issues in Fundraising, 234-246 (1997) (parenthetical in original).

[15] A report critical of the inconsistent decision-making of one of the merged organizations that now comprises an *Amicus Curiae* in this case, the Better Business Bureau and its Wise Giving Alliance, takes the organization to task for failure to follow Generally Accepted Accounting Principles ("GAAP") in its analysis of the charities it reviewed. Emigh & Wills, NCIB Evaluates Charities Unfairly and Misleads the Public (National Federation of Nonprofits) (1994).

[16] Former California Attorney General Lungren issued a Press Release prior to Christmas in 1994 (Attorney General of California, Press Release 94-120) and a report Attorney General's Report on Charitable Solicitation by Commercial Fundraisers (1994) in which at least one charity, Christian Appalachian Project, was castigated for an excessively high fundraising ratio. Unfortunately, the report did not differentiate between full fledged fundraising campaign and small feasibility test conducted to determine whether a campaign was viable. In this case the charity conducted a small feasibility test of telemarketing to lapsed direct mail donors. The costs were, as might be expected, high because it was a small test. However the charity's annual report filed with the California Attorney General in that year showed its *overall* cost of fundraising *for the year* was a mere 18% of income.

The Attorney General of New York issues a similar report each year. See, Spitzer, Pennies for Charity – Where Your Money Goes (December 2002).

[17] [F]actors other than honesty and efficiency … drive the fund

Amici are particularly concerned about this case because Petitioner is a state Attorney General. Petitioner is relying on the failure to voluntarily disclose a fundraising ratio as a sole basis a for fraud prosecution[18] even though the fundraising ratio is far too imprecise a measure by which to

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raising cost ratio. For example:

- It could be a start-up charity without a donor base
- It could be an organization with an unpopular mission, such as a home for unwed mothers, where many people must be contacted in order to find a few concerned donors who are not deterred by social stigma
- It might be a national charity that is supported by a small but loyal group of donors who are scattered across the country and make relatively small donations per capita.
- It could be an organization that is precluded from using a fund raising method that tends to deflate the fund raising cost ratio, such as the use of volunteers to solicit door-to-door or special events to raise funds locally. ...

Even if it were feasible for an organization to use a fund raising method that will deflate the fund raising cost ratio, it may still be a responsible decision to use a method that boosts the ratio. For example, a cause-oriented group may need to maximize the number of adherents in order to further its program mission. For that group, it may be worth it to use direct mail even at a loss in order to find more adherents."

Miller, Suggestions to Improve Private Standard Setting for Charities: The NCIB Proposals, Philanthropy Monthly 14 (Nov. 1987).

[18] Petitioner denies that he improperly relies on the fundraising ratio (Petitioner's Brief at 11). The facts belie this assertion. Petitioner's twice amended Complaint repeatedly focuses on the fundraising ratio and mentions it in one form or another in ¶¶ 10, 12, 16, 23, 28, 31, 34, 37, 44, 52 (67F), 53 (67G), 54 (67H), 55 (67I), 57 (67K), 58 (67L), 59 (67M), 60 (67M), 66, 68, 70-74, 77, and 80. Petitioner also argues that this Court's rather clear jurisprudence to the contrary has, in fact, left him room to claim that fundraising ratios are *relevant* to a fraud prosecution (Petitioner's Brief at 43). He dismisses the Riley holding that "there is no nexus between the percentage of funds retained by a fundraiser and the likelihood that the solicitation is fraudulent" (47 U.S. at 793) by calling it a "shorthand description" of the Munson case. (Petitioner's Brief at 43, n. 32).

evaluate the effectiveness of a nonprofit, let alone for use to determine whether fraud has taken place.

In fact, those engaged in fraud have an even greater incentive to produce reports that show a lower cost of fundraising in order to avoid inviting too much inspection.

> It could well be that a charity run by a crook has a fund raising cost ratio of 30 percent. Another organization run by honest, ethical managers who make responsible fund raising decisions and execute them efficiently may have a fund raising cost ratio of 55%. . . . [We] strongly disagree with the presumption that deserving and undeserving organizations can be identified by their place on this exclusive yardstick. The fund raising percentage has no demonstrable reliability as an absolute indicator of efficiency (much less does it begin to define 'deserving'). Miller, Suggestions to Improve Private Standard Setting for Charities: The NCIB Proposals, Philanthropy Monthly 14-15 (Nov. 1987).

II. Calculating the fundraising ratio is problematic

In theory, the fundraising ratio is an elementary calculation.[19] One simply adds up all the money spent on a

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[19] This case involves a contract with a fundraiser to provide certain services and to be compensated based on a percentage of funds raised. A minority of fundraising contracts have similar provisions, a practice frowned upon by some. See, e.g., Association of Fundraising Professionals, Code of Ethical Principles and Standards of Professional Practice, Standard 16 (2002)(found at http://www.afpnet.org/content_documents/2002_AFP_Code_of_Ethics.pdf). In most, cases, fundraisers and fundraising consultants are compensated on a fee-for-service basis. For example a fundraising consultant might be paid an agreed upon amount for each fundraising

solicitation campaign and then divides it by all the money raised by the campaign. This yields a percentage somewhere between zero and infinity.

A nonprofit could easily have a 0% cost of fundraising ratio if it was essentially dormant during the campaign period but received a bequest from a will drafted years earlier when the organization was much more active. A nonprofit could have an enormous fundraising ratio (or an infinite one) if its sole fundraising "special event" is cancelled as a result of the weather after most of the overhead expenses (food, promotion, site rental, etc.) have been paid. In neither case is the fundraising ratio indicative of the nonprofit's efficiency.

In the case of VietNow, the percentage is alleged to have been 85%. Or, perhaps it was lower because much of what Respondent was paid to do advanced the charitable mission of VietNow and was not solely fundraising activity.[20] Or, perhaps it was as high as 97%, because any one of the more than forty donors surveyed by the Attorney General of Illinois might have felt that they didn't care what percent was turned over to VietNow but rather what percent was spend by Viet Now to buy food baskets for veterans and their families.

Herein lies the problem: the calculated fundraising ratio can vary widely depending on how the calculation is

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letter he or she helped produce. Or a paid solicitor may be paid an hourly fee for his or her work.

[20] Telemarketing Associates agreed to prepare a newsletter and promote goodwill and otherwise contact the public about VietNow and its charitable mission. Record 21-67. VietNow's "primary charitable mission" includes "help[ing] increase community awareness of the difficulties encountered by the veteran and their families" and "increas[ing] national awareness of the POW/MIA status in supporting other organizations involved in the effort of accountability and release of these veterans." See VietNow National Headquarters 2000 Form 990, Schedule D, Part III available at http://justice.hdcdojnet.state.ca.us/charitysr/default.asp.

performed. Presumably Petitioner argues that Respondent is committing fraud whether the fundraising ratio is 85% or 97%. But what if the two fundraising ratios were 45% and 57%? What is the threshold of fraud where there has been no affirmative misstatement in response to a donor's request for information? The question of how the fundraising ratio is calculated could decide whether a fraud prosecution would be filed.[21] And note that these two fundraising ratios were calculated by looking at the question of donation efficiency from just two perspectives. This is merely the tip of the iceberg because there are many different perspectives on this issue.

Petitioners emphasize that it is the individual donor's perspective that matters most here. Yet, conceivably, there are quite a few donors contacted by any campaign who would not feel defrauded if more than half of their donations went to the charitable purpose, but *would* feel defrauded if less than half did.

When a nonprofit solicits tens of thousands of individuals the sheer numbers of persons contacted produces a broad range of individual beliefs as to where is the line between reasonable and fraudulent fundraising ratios. But fraud does not normally require that thousands of prospective donors feel misled. Only one is required. So does that mean that the vagaries of how someone who is contacted may feel

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[21] The Maryland statute at issue in Secretary of State of Maryland v. Joseph H. Munson Co., Inc., 467 U.S. 947 (1984) declared fundraising ratios above 25% to be illegal. The Better Business Bureau decreed that fundraising costs of 35% or greater are "unreasonable." Brief of *Amici Curiae* of the Council of the Better Business Bureaus, Inc. et al. at page 13.

Conversely, the Association of Fundraising Professionals, one of the Amici on this brief, while prohibiting percentage-based compensation, does not establish a particular ceiling on fundraising costs specifically because of the unreliability of such arbitrary measures. See, http://afpnet.org/tier3_cd.cfm?Foldes_id=892&content_item_id=1348.

about this issue will, after the fact, determine whether fraud occurred?

The problems associated with calculating a fundraising ratio are legion:[22]

- What is the proper time period over which data is gathered? One month? One quarter? One year? Several years? The length of a particular campaign?
- Should the numerator include or exclude "joint expenses" involving fundraising but which also advance the mission of the organization?
- Is the denominator the total of the nonprofit's expenses (as is done in Illinois)[23] or the total revenue?
- How does one account for the residual value of byproducts of the solicitation? For example, what is the value of a deferred gift? What is the value of having identified a significant donor who will give over a period of many years? What is the value of recruiting an unskilled but loyal volunteer?

[22] "[T]here is no uniform method for measuring fund-raising expenses. Indeed, there is disagreement within the nonprofit field over the definition of fund raising, including when and how to allocate costs between program and fund-raising activities." Hopkins, A Struggle for Balance, Advancing Philanthropy 26-31 (Fall 1995).

[23] Illinois Charitable Organization Annual Report (Form AG990-IL Revised 6/01)(found at: http://www.ag.state.il.us/charitable/ag990-annualreport.pdf) uses a calculation where the fundraising ratio is calculated as the proportion of three expense categories: Program Service, Management and General, and Fundraising. The proposed Standards for Charitable Accountability, Standard 9 of *Amicus* Better Business Bureau (found at http://www.give.org/srp/newstandards.asp) provides that a nonprofit should spend at least 65% of its total expenses on program activities so the denominator is total expenses and the numerator is "program" expenses. So any expenses for fundraising, management, legal, accounting, etc. are excluded from the resulting percentage.

What is the value of recruiting petition signers who choose not to donate?

- How does the nonprofit's commitment to building financial reserves factor into the fundraising ratio?
- How does one properly account for investments made in building a list of future donors – are these expenses or capital investment activities?
- Should the denominator be focused upon expenses or funds raised by any method or only by that particular campaign?
- Should the results of different methods of fundraising (e.g. telemarketing, direct mail, direct response TV, direct response radio, telethons, radio-thons, special events, corporate giving, foundation giving, government grants, major donor giving, lapsed donor renewal, membership recruitment and renewal, new donor acquisition, e-mail solicitation, etc.) each be measured independently for its own fundraising ratio or should the nonprofit be measured on its combined overall efforts?

This brief will discuss several of these issues in detail. But, ultimately, the lack of any consistency in the way in which these calculations are made and in the lack of meaning of any resulting calculation exposes the fatal constitutional flaws inherent in Petitioner's scheme to use fundraising ratios alone as indicia of common law fraud.

A. What is the proper time period over which data are gathered and reported?

Consider a hypothetical nonprofit that begins a program of soliciting contributions through direct mail.

Generally it must begin with a "prospect mailing" in which the nonprofit sends letters out to people who have not previously supported the nonprofit. Viewed alone, these campaigns have a very high cost. Often, they lose money.[24] The purpose of the prospect mailing is to identify donors willing to contribute in the future to the nonprofit's cause.

Once these new donors are identified, the nonprofit continues to solicit additional donations from these newly found supporters over a period of years, thereby recouping the initial cost and producing a net gain.

At some point in time, some of those donors will stop giving, and these "lapsed donors" must be replaced by prospecting for new donors, which begins the cycle again.[25]

How would the fundraising ratio be properly calculated?[26] Would one look at simply the first prospect

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[24] As this Court has observed in the past "a solicitation may be designed to sacrifice short-term gains in order to achieve long-term, collateral, or non-cash benefits." Riley, 487 U.S. at 792. "Experienced fundraisers seem to agree that direct-mail prospecting is considered effective if it breaks even (e.g., Bergen, 1991; Bush, 1991; Warwick, 1994)." Greenlee & Gordon, The Impact of Professional Solicitors on Fund-Raising in Charitable Organizations, 27 Nonprofit and Voluntary Sector Quarterly 277, 284 (1998).

[25] "One third to one half of first-time donors will never make a second gift. The pool of previous donors (the 'house list') also suffers from attrition or what Rosso (1991) calls 'the transiency factor.' According to Royer (1989), 60% of gifts to many charities come from people aged 60-76. As these donors die, lose interest, and so forth, the charity must find replacement donors. Accordingly, prospecting tends to be an ongoing process, but, for established organizations, the high cost is masked by the efficiency of resolicitations of the house list." Greenlee & Gordon, The Impact of Professional Solicitors on Fund-Raising in Charitable Organizations, 27 Nonprofit and Voluntary Sector Quarterly 277, 284-85 (1998).

[26] As noted above, many contracts for fundraising services are based on flat fees for particular services rather than percentages. Therefore the fundraising ratio cannot be determined merely by reference to a commission set in the contract. Instead, revenues or expenses and costs of fundraising for like periods must be compared after the fact.

mailing? If so, it is quite likely that the fundraising ratio will be "too high."[27] This would stop the campaign before it starts.[28] Moreover, this would be misleading.

The whole point of the prospect mailing was to identify long term donors. Wouldn't it be less misleading if some of the long term value these donors will provide to the nonprofit could be included in the fundraising ratio calculation?

This then leads to the question – over what time period should this cost (investment) vs. revenue (return on investment) be calculated? – one quarter? – one year? – the estimated period during which the donor will continue to donate?

What about an analysis of a whole campaign? There are two immediate problems with this approach. First, it is unlikely that Petitioner or other regulators would consider a fundraising ratio reported at the end of a multi-year campaign to be timely and useful information. Second, there is no accepted industry definition of "campaign." When does one campaign begin and another end?

Choosing any period can skew the results depending upon the fundraising activities in which the charity may be engaged, which is why this measure is simply not useful. If, for example the charity is just commencing a major fundraising drive, then the fundraising ratio for that year may be significantly higher than for the subsequent years when that first year's investment produces a return. Yet U.S. accounting rules prohibit nonprofits from amortizing the

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[27] See, *supra*, note 24.

[28] The nonprofit, fearing a reputation-damaging fraud investigation, would likely be too afraid to even begin a direct mail campaign. Even if it did begin, the nonprofit might face a fraud investigation just after the prospect mailing which would prevent the nonprofit from ever recovering the investment it made in the prospecting.

investment in creating a mailing list so as to properly match expense (investment) and revenue (return on investment).[29]

Thus, a start-up charity may not amortize or allocate the fundraising expense to the same periods in which the income is realized, but rather must suffer from a very high initial cost of fundraising as the charity makes significant investments in its future.

Once new donors are identified, their names and addresses often go onto a general mailing list that is used for other fundraising purposes including appeals for special projects, capital campaigns for new buildings, seeking gifts through wills and bequests, quarterly newsletters that may include an incidental opportunity to donate, and any number of other communications.

Even if the fundraising ratio of a campaign is calculated by the charity, it is often based only on the immediate results and not the value of having identified donors who may, for example, leave bequests. There is no logical time period during which such a calculation can be made.

Sometimes charities have multiple distinct charitable missions or programs, each of which has "earmarked" fundraising. Should each one have a different calculated fundraising ratio? If not, doesn't that mean that the "campaign" is effectively indefinite since the other missions will continue even if one is completed?

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[29] Instead of treating the ongoing operational investment in building a mailing list just as any other asset that might be purchased and then expensed over a number of years, U.S. accounting rules require treating such operational investments as expenses in the year made despite the fact that revenue associated with those expenses will occur later. See, American Institute of Certified Public Accountants, Audit and Accounting Guide for Nonprofit Organizations ¶ 13.06 (2002). By contrast, other countries such as Germany, the Netherlands, France, etc. allow nonprofits to amortize investments in mailing lists just as investment in any other asset may be amortized.

There is no agreed upon definition of the fundraising ratio in part because there is no agreement on any particular time period over which the calculation should be made.

B. What expenses and income are properly allocated to the fundraising ratio's numerator and denominator?

Assuming that the measuring period problem could be solved, there's still a problem of classifying what goes into the numerator and what goes into the denominator in order to calculate the fundraising ratio.

Each state may formulate its own methodology, some of which are vague. West Virginia requires nonprofits to calculate their "fund-raising percentage" by dividing "fund-raising expenses" by "income derived from fundraising."[30] Missouri requires nonprofits to report the "percentage of funds directly spent on fund-raising or directly allocated for fund-raising activities"[31] And Utah requires nonprofits to report "fundraising costs as a percentage of contributions" using data from the nonprofit's most recent Form 990.[32]

1. The Numerator: Solicitation expenses

Presumably the numerator is the amount of money spent soliciting donations or "fundraising." Money spent advancing the charitable mission should not be included.[33]

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[30] See http://www.wvsos.com/forms/charity/chr1.pdf at page 4.

[31] See http://www.ago.state.mo.us/charities/charityannualreport.pdf at page 1.

[32] See http://www.commerce.utah.gov/dcp/downloads/permitapps/charitableorganization.pdf at page 4.) Although, for Utah, a nonprofit can rely on the Form 990 instructions for a degree of certainty in calculating his fundraising ratio, Missouri and West Virginia give very little guidance on how they expect the fundraising ratio to be calculated.

[33] This is the subject of the highly controversial American Institute of Certified Public Accountants, Accounting for Costs of Materials and Activities of Not-for-Profit Organizations and State and Local

Of course, this seems a simple distinction in theory; but in reality it is quite nettlesome. This Court has already recognized this problem to a certain extent.[34] In many instances, the act of solicitation advances the charitable mission.[35]

Consider a nonprofit dedicated to women's health. A particular mass mailing might remind women to conduct a periodic breast self-examination. In part to defray the costs of the mailing and also to advance other aspects of the organization's mission, the letters might also include a solicitation for donations. The act of solicitation is inextricably bound up with the nonprofit's mission.[36]

Should the cost of these "educational" mailings be included in the fundraising ratio numerator or not? Apparently Illinois thinks they should not because their

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Government Entities that Include Fundraising, Statement of Position 98-2 ("SOP 98-2") regarding accounting for expenses that are allocable between fundraising and program services.

[34] Munson, 467 U.S. at 961. Riley, 487 U.S. at 798.

[35] "Campaigns may directly accomplish the charitable mission as a side effect of fund raising. For example, political fund raising may also raise the candidate's profile, and fund drives for Mothers Against Drunk Driving (MADD) may educate the public about the dangers of drunk driving while also raising money." Steinberg, The Economics of Fundraising, in D. Burlingame & L. Hulse (Eds.), Taking Fund Raising Seriously 239-256 (1991).

[36] Economist Richard Steinberg suggests:

> Even if public education is not one of the charity's goals, the public is educated about the charity through the solicitation process, and this information is not valueless. ... Solicitation expenditures may provide socially valuable information even when they result in a decrease in donations. The information contained in solicitation literature may convince a donor who was otherwise predisposed to contribute that his interests would be better served by spending his money elsewhere. Thus, the 'public education' defense extends far beyond those charities which explicitly count advocacy or education among their goals.

Steinberg, Regulation of Charity Fundraising: Unintended Consequences, Working Paper, Indianapolis: IUPUI Dept. of Economics (1991).

calculation of fundraising costs do not account for these activities.[37]

If the position taken by the Attorney General of Illinois is upheld, nonprofits and fundraisers would never know if they were in compliance with the law. They would, in good faith, calculate their fundraising ratio, according to the various rules and decisions promulgated by 50 attorneys general (and by an unknown, but potentially significant number of local prosecutors and regulators[38]). But the

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[37] The Supreme Court of Illinois has already discussed this very problem:

> [H]igh solicitation costs, and a solicitor's high rate of retaining receipts, can be attributable to a number of factors. Certain types of fund-raising campaigns, for example include a wide range of activities that must be paid for. The present case illustrates this point. … [The] contracts [attached to the Complaint] show that, in exchange for its fee, Telemarketing agreed to supply and pay the salaries of all marketing personnel, as well as pay all costs for an office and phones. In addition, Telemarketing agreed to be responsible for producing, publishing, editing and paying all costs for the annual publication of more than 2,000 copies of an advertising magazine that would "increase community awareness of [VietNow]." The contract required Telemarketing to conduct "an efficient and professional marketing program, promote goodwill on behalf of [VietNow], and enhance good public relations." … Defendants in this case were contracted to perform a wide range of activates on behalf of VietNow, all of which were to be paid for out of [Telemarketing's contractual portion of] the solicited funds." Ryan v. Telemarketing Associates, Inc., 198 Ill. 2d 345, 359-60 (2002).

[38] There are already numerous localities that regulate charitable solicitations even though the states in which they are located also regulate charitable solicitations. So nonprofits seeking to solicit in those localities must register again, even though they are registered with the state. See, e.g., Los Angeles, Cal, Mun. Code Ch. IV, Art. 4; Pinellas Co., Fla, Code Ch. 42, Art. VII; and Jefferson Co., Ky., Code Ch. 117. Local registration requirements present a troubling trend that has the potential to grind nationwide charitable solicitations to a halt under the weight of the

calculation would be significantly different in various jurisdictions. This will then permit, on a selective basis, one or more attorneys general to recharacterize, after the fact, the nonprofit's good faith actions as fraud.

If the calculation of the numerator in the fundraising ratio is based on mission related expenses then the calculation depends upon a precise definition of the charity's mission. Is it the mission as set forth in the organization's articles of incorporation? Is it the mission as enunciated in its application for tax exemption and upon which exemption was granted? Is it the mission as stated in its informational tax return on IRS Form 990? Is it the nonprofit's current mission statement? Or is it the content and tenor of a specific appeal?

2. The Denominator: The amount raised

Calculating the denominator in the fundraising ratio, the amount of money raised, presents difficulties as well. Of course, determining the value of cash, checks, securities and even donated property such as works of art is straightforward. But the eleemosynary act takes many forms. How are donated services valued? The tax rules place a particular value on them only if they are derived from special skills while unskilled labor is assigned no value at all. Will state attorneys general and local regulators follow this rule?

There are, of course the same definitional problems as previously discussed. What is to be included in the denominator? Are funds raised only from a particular medium (e.g. telemarketing or a special event) to be included in both the numerator and denominator? Or, should one include all funds raised from all types of public solicitations in the denominator? Or, instead, should one include all revenue regardless of source (including government grants,

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administrative and financial costs of registering with tens of thousands of jurisdictions rather than a maximum of fifty states.

service income, bequests, etc.) thereby lowering the fundraising ratio as a result of, for example, revenue from patients or government grants?

What about the value of future donations from new donors identified in prospecting campaigns? What about pledges and other promises to give (e.g. "I've left some money for your organization in my will")? They are not normally considered current income under U.S. accounting rules. Should charities avoid soliciting such gifts because the costs of solicitation will be recorded immediately while the substantial benefits may not occur until a later time period, thereby subjecting the charity to allegations of fraud? What if the nonprofit knows from years of experience that it can expect a certain percentage of pledges to be honored? If Petitioner allows that assumption, what happens if pledges are honored or dishonored at an unusual rate in a particular year and the fundraising ratio reported earlier turns out to be in error?

C. Characterization of reserves

Assuming that one could resolve the measuring period problems and the numerator/denominator problems, there's still the difficulty of how to account for nonprofits that build reserves. Many nonprofits make it a priority to save a certain percentage of their income to build an endowment, to create a "rainy day" fund, to build new facilities, or to advance some other legitimate purpose. Some applaud this approach and view it as responsible management.

Others find the practice irresponsible and claim the nonprofit is not advancing its mission as aggressively as possible and is essentially "making a profit" from its charitable solicitations.[39] Petitioner apparently agrees.[40]

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[39] The American Institute of Philanthropy, a watchdog organization, "*reduces* the grade of any group that has available assets equal to three to

Will the more than fifty other state and local regulators view the practice in a consistent way?

Consider the Nature Conservancy which was cited in Worth magazine as one of the best nonprofits in the US. The authors went out of their way to explain that "'the conservation groups' ratios are skewed because they are forced to report land acquisitions as a capital cost rather than a program expense."[41] Retained earnings from other nonprofits would not necessarily be handled this way.[42] Should such variations in accounting and reporting rules, which have a powerful effect on a nonprofit's fundraising ratio, become the basis for the exercise of a prosecutor's

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five years of operating expenses." See, http://www.charitywatch.org/criteria.html.

[40] It appears that Petitioner believes this money should not be counted. In footnote 21 of his brief, Petitioner claims that "VietNow … devotes only *one-fifth* of the remaining 15 percent – or *3 percent of the total* – to charitable programs of any kind, including public education efforts" (emphasis in original). This three percent figure is based on the $118,000 amount devoted to "program services" as reported on VietNow's 2000 Form 990. But the same Form 990 indicates that VietNow had excess earnings, or a "gain" of $157,827 for that year. Petitioner does not account for the possibility that some of this money will be used to advance VietNow's charitable mission in the future. And when VietNow does so, the money will never be counted in VietNow's favor in Petitioner's calculation of the fundraising ratio because Petitioner only looks at a percentage reported in the fundraising contract and does not account for funds raised in one year being spent to further the charitable mission in a subsequent reporting year. See VietNow National Headquarters 2000 Form 990, Part I, lines 13 and 18 available at http://justice.hdcdojnet.state.ca.us/charitysr/default.asp for the above cited figures.

Petitioner's footnote 21 intimates that VietNow's public education mission is negligible or illusory because it is funded only by some portion of the above referenced three percent of public support. Quite the contrary, and as noted above in footnote 20, a portion of Respondents' fee was compensation for furthering VietNow's public education mission.

[41] Yaqub, America's Top 100 Charities, Worth, December 2002.

[42] See, *supra*, note 40.

discretion as to whether or when to charge a charity or its fundraiser with fraud?

III. Who decides?

Clearly every question raised above can be answered as a matter of official policy. But the sheer complexity of the problem is not the only issue. Each quandary begs the question: Who decides? Who decides the time period? Who decides what's included in the numerator and denominator? Who decides if retained earnings are good or bad? Who decides all the other issues associated with calculating the fundraising ratio?

A. Regulators

Petitioner might answer that he, as the chief law enforcement officer of Illinois, would ultimately resolve these issues as they relate to solicitations in Illinois.[43] But many nonprofits raise money nationwide.[44] Thus, each regulatory official would have to resolve these same issues as

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[43] For Petitioner's case to proceed, he must first provide his definition of the fundraising ratio and that definition must then be applied to calculate the charity's fundraising ratio in any particular case. Otherwise, there will be no way for the charity's fundraising ratio to be compared with the donor's expected fundraising ratio to determine if a substantial, actionable misrepresentation was made.

Currently, Petitioner appears not to have addressed these concerns about how the fundraising ratio is to be calculated and is merely using the percentage figures from the contracts between VietNow and Respondents. He does so despite the fact that the contracts plainly indicate that a portion of these fees are compensation for Respondents' public education work on behalf of VietNow. See, *supra*, notes 20 and 37. It is unclear how Petitioner would pursue common law fraud actions against fundraisers and nonprofits operating under fee-for-service contracts where a specific ratio is not stated in the contract.

[44] Some charities raise funds internationally and must abide by other recognized accounting regimes in the various host countries where they have subsidiaries or affiliates.

they relate to his or her own constituency. And no state would be under any obligation to resolve the issues in a manner consistent with any other state.[45]

To continue exercising their First Amendment rights to communicate their charitable message and solicit donations, nonprofits soliciting nationwide would be compelled to abide by each regulatory regime, account for their income and expenditures as dictated by each regime, report the appropriate fundraising ratio to the proper regulatory authority, and disclose that fundraising ratio in each solicitation.

In effect, this would result in compelling speech from charities in the form of a disclosure.[46] Petitioner's theory is that fraud occurred if the donor expected a certain percentage of his donation to go to a given purpose when, in fact, a different percentage was dedicated to that purpose. If fraud prosecutions may move forward on this basis, nonprofits will have little choice but to affirmatively disclose their estimated fundraising ratios for each purpose and they would still be subject to after-the-fact prosecution based on poorer than expected results. Otherwise, they will face the near certainty that at least *one* donor will have had a different fundraising ratio in mind and feel misled.

To permit a state to impose such an approach would impose immense administrative, legal, and accounting costs on nonprofits. In practical terms such requirements would redirect precious charitable resources away from charitable missions and toward accountants and lawyers, thus driving up the fundraising ratios and depriving the public of value for their donations. For some, it would mean the difference

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[45] More than forty states and many localities regulate charitable solicitations. While some of the statutory schemes are similar, many are unique and definitions, required disclosures, fees, etc. vary widely. A listing of the state regulators can be found at http://www.nasconet.org.

[46] Of course, such compelled speech is unconstitutional under Riley, 487 U.S. at 795-801.

between continuing to pursue their charitable mission and being compelled to close their doors.[47]

In addition to the stark First Amendment problems this scheme poses for charities,[48] Petitioner's prosecution theory also runs afoul of the Constitution's "dormant Commerce Clause." This Court has consistently held that the Commerce Clause is more than an affirmative grant of power: it has a negative sweep as well.[49] This negative sweep, also known as the Dormant Commerce Clause, reflects the Founding Fathers' policy preference for free trade in a unified common market among the several States.[50] In practice, the Dormant Commerce Clause bars certain state actions that interfere with interstate commerce.[51]

The Commerce Clause bars States from subjecting actors in interstate commerce to a welter of complicated rules.[52] This rule prohibits States from passing laws that

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[47] This is so because of the chilling effect of the threat of a fraud prosecution. "The lack of an upper limit defining when the proportion of expenses to charitable contributions rises to the level of fraud creates uncertain results." Steinberg, Economic Perspectives on Regulation of Charitable Solicitation, 39 Case Western Reserve Law Review, 775, 775-76 (1988) (summarizing the views of Kevin Suffern, Director of the Division of Public Charities and Assistant AG, Massachusetts and co-chairman of the National Model Law Project as expressed in an article appearing in Philanthropy Monthly, Feb.1986.)

[48] These First Amendment concerns are discussed extensively in briefs submitted by other *Amici Curiae* in this case and while certainly the *Amici* represented here also feel such concerns should be determinative of this case, in the interests of judicial economy those arguments are not duplicated here.

[49] Quill Corp. v. North Dakota, 504 U.S. 298, 309 (1992).

[50] See, e.g., Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529 (1959); Kassell v. Consolidated Freightways Corp. of Delaware, 450 U.S. 662, 669 (1981).

[51] See, e.g., Quill, 504 U.S. at 309.

[52] Quill Corp. v. North Dakota, 504 U.S. 298, 313 n.6 (1992). Nor could a state hamper interstate charitable solicitations, an activity enjoying *more* constitutional protection than mere commerce, by similar means.

conflict with the legitimate regulatory regimes of other States.[53] As this Court explained before,

> If the power of Illinois to impose [the regulation at issue] were upheld, the resulting impediments upon the free conduct of interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other state, and every other political subdivision with the power to impose [such regulations]. The many variations in ... administrative record keeping requirements could entangle ... interstate business in a virtual welter of complicated obligations to local jurisdictions....The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable entanglements.[54]

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[53] Healy v. The Beer Institute, 491 U.S. 324, 336 (1989) (holding that "the practical effect of the statute must be evaluated not only by considering the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States *and what effect would arise if not one, but many or every, State adopted similar legislation*")(emphasis supplied).

[54] National Bellas Hess, Inc. v. Department of Revenue of the State of Illinois, 386 U.S. 753, 759-60 (1967).

Petitioner's proposed prosecutorial scheme would also fail the Commerce Clause's Pike test. This Court has held that:

> [w]here the statute regulates even-handedly to effectuate a legitimate local public interest ... it will be upheld unless the burden imposed on ... commerce is clearly excessive in relation to the putative local benefits. ... And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate commerce. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

Petitioner's prosecution scheme would certainly impose an excessive burden on fundraising in relation to the putative local benefit.

If more than fifty government regulators can create more than fifty independent regulatory regimes for calculating fundraising ratios, and nonprofits seeking to communicate their charitable speech and solicit donations nationwide must comply with each regime, that will certainly subject nonprofits to a "complicated welter" in violation of Quill.

B. Citizens

Petitioner might answer that there need be no strict or uniform definition of the fundraising ratio. Instead, the question would rest entirely in the hands of individual citizens. If a citizen, as a result of an after-the-fact survey, simply felt that he or she were misled about the amount of their donation going to the charitable purpose, that would seemingly be enough for a *prima facia* case of common law fraud.[55] If not, what standard does the Petitioner propose so that charities and fundraisers may know how many must feel defrauded before a prosecution may ensue?

This position, that the discretion is not in the hands of the Attorney General but rather the citizen, is premised on the donor having in mind a clear but unspoken definition of fundraising ratio. The citizen would thus evaluate, for example, whether paying for overhead such as rent, electricity, telephone, etc. at the nonprofit's headquarters was

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The burdens of allowing each state and local law enforcement authority to define how fundraising ratios will be calculated have already been discussed. And this Court has already ruled that there is no necessary nexus between fraud (the prevention of which is a legitimate interest) and high solicitation costs. Munson, 467 U.S. at 961.

In addition, fraud prevention could be promoted as well or better through means having a lesser impact on interstate commerce and free speech. Riley, 487 U.S. at 795. Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 639 (1980).

[55] Pet. Br. at 28 n. 23 suggests that what matters for purposes of establishing fraud is not what Petitioner thinks is reasonable but rather what the citizens understood from what they were told.

a legitimate use of his donation; whether public education in the form of a combined newsletter and solicitation was a legitimate use; whether staff salaries were a legitimate use; and so on.

This formulation runs even further afoul of the Commerce Clause because it essentially holds nonprofits to fundraising ratio definitions of an infinite number and variety, limited only by the imagination of millions of potential donors. Moreover, it places unbounded discretion in the hands of Petitioner and other regulators. Under this regime, there will *always* be *some* donor to *every* nonprofit who is dissatisfied with how his donation was spent. Petitioner would merely have to draft a survey affidavit, send it out to enough donors, and find at least one who felt misled in order to selectively target that nonprofit.

Thus, every nonprofit and fundraiser faces a fraud prosecution at any time as long as they continue soliciting donations. The only means to protect themselves are (a) elaborate and burdensome disclosures, including disclosures of fundraising ratios that they can only hope that donors and regulators will agree are calculated properly and (b) the regulator's mercy exercised through prosecutorial discretion.[56]

CONCLUSION

The most extensive database on nonprofits and their reported annual financial results in the United States has been

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[56] This is similar to the situation commented upon by Chief Judge Posner in United Cancer Council v. Commissioner of Internal Revenue, 165 F.3d 1173 (7th Cir. 1999): "We were not reassured when the government's lawyer, in response to a question from the bench as to what standard he was advocating to guide decision in this area, said that it was the 'facts and circumstances' of each case. That is no standard at all, and makes the tax status of charitable organizations and their donors a matter of the whim of the IRS." Id. at 1179.

compiled and published on the Internet as "Guidestar."[57] The chief executive of Guidestar's parent nonprofit organization has spent a great deal of time thinking about the various ratios that can be calculated to measure the performance of nonprofits. He says:

> In the final analysis the worthiness of a charity is a function of the unique value set of the individual donor. Some donors like large, endowed institutions that work on a long-term society need. Others like fast growing, cash-poor organizations that attend to acute needs. There are scores of potential models for assessing the value of a charity. In our opinion, "efficiency" per se, based upon certain financial ratios is probably not a good measure unless you are looking at a single organization's financial progress over time or at a group of very similar peer organizations. If you are looking at ratios as an indicator of worthiness, remember that the age, growth rate, dependence upon donations from the public (as opposed to foundation or government grants or earned revenue), and type of work (research, education, direct service, resource pass-through, etc.) will likely all have far more to do with the reported ratio than the fundamental operating efficiency of the organization.[58]

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[57] This can be found at http://www.guidestar.org and was compiled by Philanthropic Research, Inc. a nonprofit organization. A discussion of fundraising cost ratios and their calculation and usefulness can be found on the "Guidestar" website at http://www.guidestar.org/news/features/ratios.stm

[58] Found at http://societytalk.guardian.co.uk/WebX?14@189.mim4cojfuLb.0@.ee902fb/3.

Petitioner's prayer for relief should be denied not only because there is no nexus between fundraising ratios and charitable fraud, but also because it would violate their First Amendment rights by compelling speech, and it would subject nonprofits to an infinitely complicated and conflicting regulatory regime that would essentially end mass charitable solicitations under massive administrative expenses in violation of the Commerce Clause.

Thus, the judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted,

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No. 01-1806

JAN 21 2003

IN THE

Supreme Court of the United States

THE PEOPLE OF THE STATE OF ILLINOIS
ex rel. JAMES E. RYAN, ATTORNEY GENERAL
OF THE STATE OF ILLINOIS,
Petitioner,

v.

TELEMARKETING ASSOCIATES, INC.,
RICHARD TROIA and ARMET, INC.
Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF *AMICUS CURIAE* DISABLED AMERICAN VETERANS IN SUPPORT OF RESPONDENTS

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Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF *AMICUS CURIAE* DISABLED AMERICAN VETERANS IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

Disabled American Veterans ("DAV" or "National Organization") is a veterans service organization chartered by Congress pursuant to 36 U.S.C. § 50301, *et seq.*[1] DAV has more than 1.1 million members, all of whom are wartime-

[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus* made a monetary contribution to the preparation or submission of this brief. The parties have consented in writing to the filing of this brief, and DAV has filed their letters of consent with the Clerk.

disabled veterans. DAV operates a number of charitable programs to improve the lives of disabled veterans, their dependents and survivors. DAV receives no direct government funding and relies for its support on the generosity of a grateful nation. Virtually all of DAV's contributions are in response to its direct mail campaigns. DAV is one of the largest, if not the largest, direct mail charitable fundraisers in the nation.

Although DAV does not engage in telemarketing, either directly or through the use of independent telemarketing firms, the position taken by the Attorney General of Illinois in this case poses a serious threat to DAV's direct mail fundraising efforts. The Attorney General asks that a state regulator be granted discretion to challenge as fraudulent a charitable solicitation campaign simply on the basis that the donor was not informed that the campaign in question would not itself generate much direct net revenue for charitable programs. Such discretion would place in jeopardy, *inter alia*, solicitation campaigns that are aimed at persons not currently active donors to DAV. Although such campaigns almost always operate on a break-even or loss basis, they are essential to maintaining a strong base of support. Acceptance of the Attorney General's position in this case would leave DAV vulnerable to charges of fraud each time it conducts such a "donor acquisition" campaign. Consequently, DAV has a significant stake in the outcome of this case.

SUMMARY OF THE ARGUMENT

DAV's nationwide service programs require substantial support from a strong donor base. To maintain that base, DAV must regularly conduct "donor acquisition" solicitation campaigns to replace donors who have become inactive, whether because of death or some other reason. Historically, these campaigns generate little immediate net revenue. These campaigns, essential to DAV's vitality and to its very existence, could be placed at risk if the Attorney General prevailed in this case. Thrift store operations that fund certain activities of local DAV departments and chapters around the country would also be threatened. The donor protection objectives that evidently underlie the Attorney General's position are already substantially achieved, without intrusion on First Amendment rights, by the ever-growing number of sources through which donors can make pre-contribution assessments of a charity's financial performance.

ARGUMENT

DAV welcomes the opportunity to participate in this case as *amicus curiae* and urges the Court to follow its decisions in *Riley v. National Fed'n of the Blind,* 487 U.S. 781 (1988), *Secretary of State v. Joseph H. Munson Co.* 467 U.S. 947 (1984), and *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620 (1980) and affirm the judgment of the Supreme Court of Illinois. The position of the Attorney General of Illinois, stripped to its essentials, is this: if a charity knows that it will net 15% or less from a solicitation campaign and fails to share that knowledge voluntarily with donors, the solicitation campaign is open to a charge of fraud. Were this position to receive this Court's *imprimatur,* DAV's fundraising and, consequently, its nationwide service programs for disabled veterans, would be at risk. The limited fundraising programs and the local service activities of DAV departments and chapters would face even greater danger. The paternalism underlying the Attorney General's position is unnecessary. Donors not only can, but do, discover information about the financial performance of charities and are free to make contribution decisions based on that information.

I. THE ATTORNEY GENERAL'S POSITION POSES A DIRECT THREAT TO DAV'S FUNDRAISING AND TO ITS NATIONWIDE VETERANS SERVICE PROGRAMS.

A. DAV's Service Activities Profoundly Improve Veterans' Lives.

DAV is widely recognized as the nation's pre-eminent provider of services to disabled veterans and their families. The programs are many and varied, but the centerpiece in DAV's array of services is the claims advocacy program. That program is operated at more than seventy DAV offices coast to coast and in Puerto Rico at which some two hundred sixty highly trained National Service Officers offer free assistance to veterans, representing them in claims for disability compensation and related federal and state benefits. National Service Officers also represent veterans at the United States Court of Appeals for Veterans Claims. Moreover, if disabled veterans cannot come to DAV, DAV takes its services to them in a fleet of state-of-the-art offices on wheels. The impact of the DAV claims advocacy service program on veterans' lives is staggering. For example, in 2000-2001, DAV National Service Officers obtained more than $1.8 *billion* in veterans benefits for their clients.

In addition to the claims advocacy program, DAV also heads up a nationwide program to provide transportation for veterans with appointments at various health care facilities of the United States Department of Veterans Affairs ("VA"). This project, which started in 1986, is funded jointly by the DAV National Organization and participating DAV state departments and local chapters. The program has produced remarkable results. DAV has donated to VA 1,194 new vans with a value of $24 million. Just as impressive, DAV volunteers, under the direction of various DAV state departments,

have contributed 14 million hours to drive those vans 273 million miles, transporting veterans to more than 7 million medical appointments.

B. DAV's Service Program Requires the Support of a Large and Sophisticated Fundraising Operation.

DAV's financial commitments are quite substantial for a charity whose "cause" is not in the headlines on a daily basis. In fact, it costs the National Organization approximately $65 million a year to run its service programs. Unlike Respondents' client charity, DAV does not employ third-party fundraisers, nor does it utilize telemarketing to solicit contributions. Virtually all of DAV's contributions are generated through its direct mail campaigns. DAV mails roughly sixty million solicitation pieces each year, raising about $100,000,000. Although direct mail is an expensive way to raise funds, it has been the only cost-effective method for DAV. Despite the ever-increasing costs of postage and mailing materials, DAV keeps its fundraising cost at about 30% of the total contributions that it receives after program allocation.

C. The Successful Fundraising Activities That Support DAV's Service Programs Require Unprofitable "Donor Acquisition" Campaigns That Would Be Threatened by the Attorney General's Position.

DAV's success in financing its programs does not change the fact that fundraising is not easy. One of the main problems is that donors come and go. Whether because of death, economic circumstances, ennui, or diversion of resources to other organizations, a charity will typically lose a significant percentage of its active donor base each year. For example, DAV has the support of about 8,000,000 active donors at any one time, but loses about 20% of those (1.6 million) each

year. Unless those donors are replaced, DAV's financial support could not possibly remain at its current levels and would quickly fall to a point where existing programs could no longer be funded.[2]

To replace the 1.6 million donors that it loses annually through attrition, DAV sends approximately 30 million pieces of "donor acquisition mail." These are solicitations sent to persons who are not currently donors to DAV. Acquisition mail campaigns are expensive and DAV does not even expect to recover the cost of such a campaign from the campaign itself. Viewed in isolation, these campaigns produce little, if any, net revenue to DAV. The response rate on acquisition mail campaigns is much lower than on mailings to existing donors, with the result that it may well "cost more than a dollar to raise a dollar."[3]

Without donor acquisition activity a charity such as DAV would soon wither and eventually die, along with its service programs. *See Schaumburg*, 444 U.S. at 632 (without solicitation of financial support, "the flow of . . . information and advocacy would likely cease"). But how could DAV defend against a lawsuit that challenged an acquisition mailing as fraudulent? By conducting a longitudinal analysis of contributions from donors acquired in the particular mailing to show its overall and ultimate profitability, thereby delaying resolution of the suit for years? By challenging the Attorney General's definition of "campaign?" By pointing to the educational and other mission-related objectives that the campaign achieved? There is no good answer.

[2] The Attorney General appears to underestimate dramatically the effort and expense required to maintain, much less expand, a donor list. *See, e.g.*, Amendments to Complaint ¶¶ 68, 69, J.A. 102-03. As detailed herein, fully half of DAV's mailings are dedicated to combating donor attrition. One can imagine that a charity without DAV's well-earned pedigree would find the task even more difficult. Start-up charities may have no existing donor base whatsoever, and thus the ratio of acquisition mailings to donor mailings may be much higher than DAV's.

[3] Max L. Hart, *Ethics, Privacy and Consumer Interests*, DMA NON-PROFIT COUNCIL INFORMATION EXCHANGE 1, 3 (Summer 1994). Mr. Hart, the recognized dean of non-profit fundraisers, managed DAV's direct mail program for three decades. He was recently inducted into the Direct Marketing Association's Hall of Fame, one of only 76 members, including the likes of Leon L. (L.L.) Bean and Aaron Montgomery Ward.

These are but some of the problems that arise from a state-set limit on acceptable fundraising expenditures. However disguised and distinguished, the present case is, as the Supreme Court of Illinois correctly found, about whether fundraising costs can be used as a yardstick for determining whether a charity may exercise its First Amendment rights. This Court has already addressed and answered this question in *Riley, Munson,* and *Schaumburg*. The Attorney General's effort to distinguish those three cases from the case at bar on the ground that the earlier decisions invalidated statutes limiting fundraising costs "even absent any representation by the charitable organization," Reply Br. in Supp. of Pet. for Writ of Cert. at 3, is unpersuasive. The earlier cases involved efforts to legislate limits on permissible costs for solicitations making representations that contributions would serve a charitable purpose.[4] This case involves an effort to achieve the same result by litigation. What is at issue in all the cases is whether a state-imposed limit on charitable fundraising expenses comports with the First Amendment.[5]

[4] For example, the Maryland statute at issue in *Munson* defined "solicit" as meaning "to request [donations] in any form on the plea or *representation* that [they] will be used for a charitable purpose." *See Munson*, 467 U.S. at 960 n.8 (quoting Section 103A(i), Art. 41, MD. ANN. CODE (1982)) (emphasis added).

[5] The Attorney General presumably would permit any percentage cost of fundraising as long as the percentage was voluntarily disclosed at the time of solicitation. This Court has already recognized that such a requirement can be tantamount to muzzling protected expression: "the

II. THE ATTORNEY GENERAL'S POSITION POSES A SERIOUS RISK TO CERTAIN FUND-RAISING ACTIVITIES CARRIED OUT BY DAV STATE DEPARTMENTS AND CHAPTERS.

DAV has chartered fifty-two state departments,[6] which in turn supervise approximately two thousand local chapters. The departments and chapters ("subordinate units") operate indispensable service programs that supplement those run by the National Organization. Many departments and chapters participate financially and in other ways in the van donation and transportation program described above. Some subordinate units operate claims advocacy programs that augment the representation provided to disabled veterans at National Service Offices.

The National Organization severely restricts the type and amount of fundraising that subordinate units are permitted to conduct, and thus itself provides much of the funding to departments and chapters. The fundraising restrictions and consequent "top-down" funding were introduced several years ago. In the past, most departments and chapters had no alternative save to rely on third-party professional fundraisers and, as a policy matter, the National Organization preferred that DAV supporters not receive multiple, apparently competing contacts on behalf of various DAV entities. Presently, departments and chapters may conduct only pre-approved local fundraising activities of limited duration. In addition, some DAV departments and chapters augment their budgets for veterans service programs by running, or lending their names to, thrift store operations. The existence of these long-established participants in the charitable community would be in particular peril if the Attorney General prevailed.

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disclosure will be the last words spoken as the donor closes the door or hangs up the phone." *Riley*, 487 U.S. at 800.

[6] The fifty states, along with the District of Columbia and Puerto Rico.

Charity-related thrift stores raise money by selling donated personal property. Many of these operations—which exist in almost every community, often affiliated with respected charities—would be unable to satisfy the standard of legitimacy that the Attorney General proposes. On one popular thrift store model, a management company solicits donations of saleable personal property in the name of a charity and operates a retail thrift store in the name of the charity. Under this model, the charity takes no risk and assumes no store overhead and, in return for the use of its name, receives a payment from the management company. This payment is often a percentage of the gross revenue of goods sold, and rarely exceeds 10%.[7] Clearly, this 10% is "found" money for a charity, often vital for its programs, not to mention that thrift stores also provide some lower-income persons with access to quality goods that might be unavailable to them otherwise. Despite the long history of thrift stores,[8] in the Attorney General's view, their inherently high overhead costs would make them *per se* fraudulent unless these costs were disclosed to all thrift store donors.

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[7] Some of DAV's departments and chapters are involved in thrift store activities on the model described. The National Organization requires that the management companies return to the DAV entities a minimum of 10% of the gross revenue generated from the sale of donated goods. Although this percentage may appear low, it is in fact a fairly stiff requirement. In California, for example, the average percentage paid to all reporting charities engaging in thrift operations on this model is 8.44%, with many receiving far less than that. CAL. ATT'Y GEN. SUMMARY OF CHARITABLE SOLICITATIONS BY COMMERCIAL FUNDRAISERS, at 10-11 (March 2001).

[8] DAV is aware that certain thrift stores have received unfavorable publicity due to poor management or questionable practices. Nonetheless, most thrift stores, like most charities, operate properly and make a genuine effort to effect their mission.

III. GOVERNMENT NEED NOT REGULATE FUNDRAISING COSTS, AS DONORS CAN, AND DO, INVESTIGATE THE FINANCIAL PERFORMANCE OF CHARITIES.

Governmental efforts to control the fundraising costs of charities are usually, as here, cloaked with the mantle of consumer protection. Yet, when First Amendment considerations are involved, regulation must often give way to right. This was certainly the basis for the Court's suggestion that "less intrusive" measures than percentage limitations be implemented to root out charitable fraud. *Schaumburg,* 444 U.S. at 637. The Attorney General's weapon of choice—fraud litigation—is hardly less intrusive than the methods of regulation that this Court struck down in *Riley, Munson,* and *Schaumburg*. *Cf. Riley,* 487 U.S. at 794 (noting that the threat of litigation over the reasonableness of a fundraising fee unnecessarily chills protected First Amendment activity). Either way, a charity is subject to enforcement activity simply by virtue of its fundraising costs.

Even assuming, *arguendo,* that donation decisions are affected by a contributor's knowledge of the fundraising costs of the involved charity, there are less intrusive and less paternalistic methods of protecting donors than by silencing charities. Now, more than ever before, donors who want a charity's financial information can get it. There are at least four obvious sources of such information:

A. Charities.

Most reputable charities provide financial reports to donors upon request, often including information above and beyond disclosures that may be required by law. DAV receives and responds to tens of thousands of donor inquiries each year, many of which are specific questions about DAV's finances. These questions range from the general (how much does DAV raise each year?) to the specific (why does DAV put

real postage stamps on return envelopes?).[9] In each case, DAV endeavors to provide a full and accurate answer to the inquiry.

B. State Governments.

This Court pointed out fifteen years ago in *Riley* that "the State may itself publish the detailed financial disclosure forms it requires [charities] to file." 487 U.S. at 800. This statement signals a recognition by the Court that it is desirable that information about a charity's financial performance be available to those donors that wish to examine it. *See Schaumburg,* 444 U.S. at 637-38. Since the decision in *Riley*, the amount and quality of information available to donors from states has increased dramatically.

A vast majority of states, including Illinois, require most charities raising funds within their borders to file initial registration documents and/or annual financial reports. *See Schaumburg,* 444 U.S. at 638 n.12 (noting Illinois' registration and reporting requirements). In most cases, charities must file both.[10] These filings are, of course, available to the public upon request. To facilitate and encourage public access, a number of states require that all solicitations be accompanied by a disclosure of exactly how a potential donor can obtain information about a charity's financial performance.[11] Indeed, since the *Riley* decision, thanks to the

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[9] The answer is that it increases return and ultimately lowers fundraising costs.

[10] The Multi-State Filer Project, a joint undertaking of the National Association of State Charities Officials and the National Association of Attorneys General aimed at standardizing registration requirements, reports that forty states currently have such requirements. www.nonprofits.org/library/gov/urs/index.html

[11] Florida, Maryland, Michigan, Mississippi, New Jersey, New York, North Carolina, Pennsylvania, Virginia, Washington and West Virginia impose such a requirement.

Internet, donor access to this data has become even easier. Some states make required charity filings, or the data from them, available on government websites.[12] Ironically, at this writing, Illinois does not require any disclosure concerning the availability of financial records, nor does it publish filings on its website, which remains "under construction."

C. Federal Government.

In addition to making charities' tax returns available through the Internal Revenue Service, 26 C.F.R. § 601.702(d)(3), the federal government has also issued regulations imposing obligations on charities to facilitate donor access to, and inspection of, financial information. *See* 26 C.F.R. §§ 301.6104(d)-1(a), 301.6104(d)-2(b). These regulations implement 26 U.S.C. § 6104(d) and detail the obligations of tax exempt organizations to make their financial information available to the public, and the methods of meeting those obligations. The thrust of the regulations is to ensure broad and easy access by the public to both an organization's application for tax exemption and its recent financial reports filed on Internal Revenue Service Form 990.

D. Private Organizations.

Finally, several "watchdog" organizations with their own publications and websites compile and analyze charities' financial data for the donating public.[13] These agencies pay

[12] Three of several possible examples are Washington (www.secstate.wa.gov/charities), New Mexico (www.ago.state.nm.us/charity/charity.htm) and California (www.caag.state.ca.us/charities).

[13] One such influential "watchdog" organization is the BBB Wise Giving Alliance ("Alliance"), the result of a merger of the National Charities Information Bureau and the Council of Better Business Bureaus' Foundation and Philanthropic Advisory Service. In addition to its various print publications, the Alliance makes many of its analyses available online at www.give.org.

particular attention to the ratios of a charity's total income to its program-related expenditures and its fundraising costs, so that a donor wishing to use those ratios as a yardstick for determining whether to make a contribution will find easy access to the information through such organizations.

This Court recognized long ago that promoting the disclosure of the finances of charitable organizations would assist states in preventing fraud. *Schaumburg,* 444 U.S. at 637-38. The efforts of charities, together with state and federal disclosure requirements and reports by private watchdog agencies, have combined to place an unprecedented quantity of information at the disposal of donors. The advent of the Internet has made access to this information faster and easier than ever. Financial reporting by charities, coupled with mandatory public disclosure of this information, is certainly a "more benign and narrowly tailored option[]" for combating fraud than the course that the Attorney General advocates. *Riley,* 487 U.S. at 800. "Such measures may help make contribution decisions more informed, while leaving to individual choice the decision whether to contribute to organizations that spend large amounts on salaries and administrative expenses." *Schaumburg,* 444 U.S. at 638.

CONCLUSION

For the reasons set forth above, DAV requests that the Court affirm the judgment of the Supreme Court of Illinois.

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JAMES E. RYAN, ATTORNEY GENERAL OF ILLINOIS,
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v.

TELEMARKETING ASSOCIATES, INC., ET AL.,
Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

Brief of Thirty-Two Commercial Fundraisers and Fundraising Consultants* as *Amici Curiae* in Support of Respondents

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CONSENT TO FILE

Consent to file this Brief *Amici Curiae*[1] has been obtained from Petitioner and Respondent.

INTEREST OF THE *AMICI*

Amici are commercial fundraisers and consultants.[2] They specialize in raising money for charities. As such, they are quite concerned about fraud in charitable solicitations. And they well understand the public outrage over allegations that a fundraiser kept 85% of donations made to a charity. However, they also know this charge is misleading in this case.

First, there is no nexus between a high cost of fundraising percentage ("CFP") and fraud.[3] This Court has so ruled in Schaumburg, Munson and Riley and *Amici*, along with industry experts, wholeheartedly agree. Second, the contracts attached to Petitioner's complaint plainly show that a portion of Respondents' compensation was for public education efforts advancing VietNow's charitable mission.

Amici's interest in this case is not the welfare of Respondents, but the concern about the consequences of Petitioner's success in this matter. If Petitioner's prayer for

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[1] Neither party's counsel authored any portion of this brief nor made any monetary contribution to the preparation or submission of this brief. *Amici* provided financial support for this brief directly as well as through American Charities for Reasonable Fundraising Regulation, a nonprofit organization. Consent letters are on file with the Clerk of the Court.

[2] Commercial fundraisers solicit on behalf of nonprofits and often collect contributions before passing them along. Fundraising consultants, by contrast, do not solicit but instead consult with nonprofits on how the nonprofits themselves may make more effective solicitations. Fundraising consultants do not receive, possess, or handle contributions.

[3] Riley v. National Federation of the Blind of N.C., Inc., 487 U.S. 781, 793 (1988); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 636 (1980); and Secretary of State of Maryland v. Joseph H. Munson Co., Inc., 467 U.S. 947, 961 and 966 (1984).

relief is granted, fundraising for charities will undoubtedly become significantly more difficult and expensive because fundraisers will either be compelled to disclose the CFP during each solicitation or they will face potential fraud liability in every solicitation. In fact, they may face fraud liability *even though* they disclose the CFP in every solicitation. Not only will this chill charitable speech and thus injure all Americans to one extent or another, but it would also strip fundraisers' clients (charities) of many of their constitutional rights and guarantees.

SUMMARY OF ARGUMENT

To the extent that fraud in charitable solicitations can be compared to common law fraud, Petitioner's facts and theory do not present sufficient evidence for a *prima facia* fraud case. First, donors were simply not defrauded. They were offered an opportunity to help advance VietNow's charitable mission and that is precisely what they got. Second, the facts do not support Petitioner's argument that donors were misled about Respondents' fee. Respondents affirmatively and fully disclosed this information[4] and, in fact, did so more completely and honestly than did Petitioner in the conduct of his survey.[5]

If Petitioner is allowed to prosecute charitable solicitations fraud complaints with only the evidentiary showing present in this case, he will essentially dissolve certain constitutional protections under the weight of a pervasive, perpetual threat of fraud prosecutions. Petitioner's fraud prosecution theory would essentially compel fundraisers to disclose the CFP (assuming there is agreement on what this is and how it is calculated) in their solicitations as the only conceivable safe harbor against a fraud complaint. And even this safe harbor would not protect them, because

[4] See *infra* note 13.
[5] See *infra* note 14.

there is often no way for a fundraiser to know a CFP before solicitations begin or even while they are being conducted. Fundraisers would essentially be inviting a fraud complaint *every time* they worked on behalf of charities.

Ultimately, Petitioner seeks to arrogate too much discretion to the state and his office under this fraud prosecution theory, and he has already raised questions about his office's ability to exercise this discretion impartially.[6]

ARGUMENT

Petitioner seeks to construct a *prima facia* fraud complaint on the following allegations: (1) Respondent told donors that their contributions would go to certain aspects of VietNow's charitable mission, (2) but because Respondent only turned over 15% of those donations to VietNow,[7] this was substantially and intentionally false or misleading, and (3) had donors known when they were solicited that Respondent would retain 85% of donations, they would not have donated in the first place. There are several flaws with this theory.

I. The donors in this case were not defrauded

Petitioner claims this case is founded on the familiar principles of consumer fraud. But this reasoning does not withstand close scrutiny. Consider a consumer who ordered a cheeseburger and a beer at a restaurant for ten dollars. Later on, a neighbor tells the consumer that he paid for much more than a cheeseburger and a beer. He paid for things he probably wanted, such as refrigeration, napkins, and the

[6] See text accompanying note 37 *infra*.
[7] According to the Chronicle of Philanthropy, this is a rather typical yield for a veterans' group employing a commercial fundraiser. Lipman, Calling Solicitors to Account, Chronicle of Philanthropy, April 5, 2001.

cook's wages. But he also paid for things that he did not want, such as marketing and overhead.

The neighbor says that, in his own calculation, five or more of the dollars he spent went to defray this latter set of costs. In fact, the food he was sold only really cost about one and a half dollars. Was he defrauded?

Of course not. And by the same reasoning, it is unrealistic and irrational to argue that donors were defrauded in this case on similar evidence. Both the consumer and the donor got what they wanted. The consumer got his cheeseburger and beer. And the donor was able to make a contribution to VietNow along with the personal satisfaction, tax deductions, etc. appertaining thereto.

Donors in this case were asked to contribute to VietNow and given examples of what VietNow does to help Viet Nam veterans. However, VietNow donors would probably support most other aspects of VietNow's charitable mission about which they did *not* hear during the solicitation. For example, even though a donor only heard that VietNow helps Chicago-area Viet Nam veterans with rent and food baskets, he would most likely also support VietNow's mission to raise awareness of Viet Nam veterans issues, particularly the POW/MIA issue.[8]

And, just as the consumer can complain that part of his ten dollars went to overhead and marketing expenses, the donor can complain that part of his donation went to administrative and fundraising expenses. But that does not mean either the consumer or the donor was defrauded. This Court has already held that "[d]onors are … undoubtedly aware that solicitations incur costs, to which part of their donation might apply."[9]

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[8] See *infra* note 14.

[9] Riley, 487 U.S. at 781. *Amici* believe this is a kind of "reasonable donor" doctrine holding that a reasonable donor is not blind to the obvious realities of the nonprofit sector.

If donors wanted 100% of their money to go directly to Viet Nam veterans, their best strategy would be to locate a needy, deserving

In light of all this, it is difficult to see how donors were defrauded by Respondents under Petitioner's theory.[10] Donors contributed to VietNow. At the time they contributed, Donors were told about certain aspects of VietNow's charitable mission. Ultimately, the contributions were indeed devoted to those aspects, but the contributions were also dedicated to other, equally legitimate aspects of VietNow's charitable mission. The contributions also helped defray necessary administrative and fundraising costs that any reasonable donor would expect a charity to incur.

II. The donors in this case were not misled

Petitioner correctly states that Respondents told donors that their donations would be used to further certain charitable purposes of VietNow.[11] Petitioner then argues that because the contract between Respondent and VietNow provided that 85% of funds raised would be retained by

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Viet Nam veteran themselves and give their money to him directly. This highlights a central purpose of charities that is often overlooked or derided as wasted administrative costs. Charities reduce the transaction costs between the eleemosynary impulse and actual charitable gifts and acts. A major reason why so many people give to charities is that they have economies of scale, they can direct resources efficiently, and they can identify those in need. Once a charity is up and running, a donor can further a charitable mission by merely writing a check rather than undertaking all the associated legwork himself.

[10] In fact it is difficult to understand how the instant case is any more "fraudulent" than state lotteries. Although studies indicate otherwise, the state itself, acting as both regulator and promoter, often tells voters that lottery proceeds will improve school funding or other "public purposes" and occasionally encourages consumers to believe that the chances of winning are greater than they actually are. Despite these "misrepresentations," there is no record of prosecution of state lotteries for fraud. Heberling, State Lotteries: Advocating a Social Ill for the Social Good, The Independent Review, v. VI, no. 4, Spring 2002, 597-606.

[11] Pet. Br. at page i.

Respondent as a fee for its services that the donors were necessarily misled.[12] That is, quite simply, wrong.

First, it is undeniable that Respondents disclosed the terms of its contract with VietNow, including the portion of each donation that Respondents would retain, *before* any solicitation began.[13] Rather than being withheld, this information was affirmatively placed on the public record. Not only that, but the *entire contract* was disclosed, thus making available to the public, including prospective donors, a complete and accurate understanding of the agreement between Respondent and VietNow. Any interested donor could learn that Respondents retained 85% of donations received. Such a donor could also have learned that this 85% fee was not entirely payment for soliciting donations. It included compensation for carrying out VietNow's public education mission and for the associated administrative costs.[14]

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[12] Pet. Br. at 16.

[13] Ill. Rev. Stat. ch. 225 para. 7(a) (2003) clearly states that "A true and correct copy of each contract [between charities and fund raisers] shall be filed by the professional fund raiser … with the Attorney General prior to the conduct of a fundraising campaign under the contract."

Petitioner admits that Respondent was properly registered for years before this action began. Am. Compl. ¶ 22. Record 8.

Ill. Rev. Stat. ch. 225 para. 2(f) (2003) decrees that "professional fund raisers' contracts … shall be open to public inspection."

In a sense, Petitioner's regulatory regime would compel fundraisers to first incriminate themselves when they file their contracts and subsequently subject themselves to fraud prosecutions when they solicit donations without disclosing a CFR, as they are entitled to do. Riley, 487 U.S. at 799-800. After all, if Petitioner's interpretation of the contract and fraud jurisprudence is correct, how could it *not* be fraud if the fundraiser keeps 85% and fails to disclose that during solicitations? The Attorney General is essentially telling the Respondent that he will register Respondent's contract because there is no constitutional law preventing it, but expect a summons as soon as solicitations commence.

[14] Telemarketing Associates agreed to promote goodwill and otherwise contact the public about VietNow and its charitable mission. Record 21-67, 214-218. VietNow's "primary charitable mission" includes

Respondents were under no obligation whatsoever to reveal any information concerning the cost of fundraising during solicitations.[15] And why should they? As this Court has held before, there is no nexus between a cost of fundraising percentage ("CFP") and fraud.[16] The state's presumption that "the charity derives no benefit from funds collected but not turned over to it" is false.[17] Donors are generally aware that solicitations incur costs and part of their donation will be applied to such costs.[18] And, most importantly, such compelled disclosure will almost certainly hamper legitimate fundraising efforts.[19] If the CFP were an

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"help[ing] increase community awareness of the difficulties encountered by the veterans and their families" and "increas[ing] national awareness of the POW/MIA status in [sic] supporting other organizations involved in the effort of accountability and release of these veterans." See VietNow National Headquarters 2000 Form 990, Schedule D, Part III available at http://justice.hdcdojnet.state.ca.us/charitysr/default.asp.

> The Supreme Court of Illinois recognized this saying: The contract required Telemarketing to conduct "an efficient and professional marketing program, promote goodwill on behalf of [VietNow], and enhance good public relations." … Defendants in this case were contracted to perform a wide range of activates on behalf of VietNow, all of which were to be paid for out of [Telemarketing's contractual portion of] the solicited funds." Ryan v. Telemarketing Associates, Inc., 198 Ill. 2d 345, 360 (2002).

In contrast, it was *Petitioner's* solicitation of affidavits that was misleading in this case. In Petitioner's survey affidavits, he twice indicated that "80% or more of [the donor's] donation would be used for professional fund raising expenses" even though Petitioner had in his possession clear evidence to the contrary, namely the fundraising contracts clearly indicating that Respondent was undertaking far more than just fundraising.

[15] Riley, 487 U.S. at 798.

[16] See *supra* note 3.

[17] Riley, 487 U.S. at 798.

[18] Riley, 487 U.S. at 799.

[19] Riley, 487 U.S. at 799.

important and material matter to the donor, he was free to inquire about it.[20]

III. Petitioner's proposed relief would undermine constitutional protections and guarantees to which fundraisers and their clients are entitled

Petitioner seeks this Court's blessing for a radically new fraud prosecution theory. For decades, this Court has explicitly recognized that charitable solicitations and charitable speech are inextricably intertwined and thus merit the full protection of the First Amendment.[21] This Court, citing the real-life practicalities of charitable fundraising, has held that a high CFP is no indicator of fraud in charitable solicitations.[22] Petitioner's relief would necessarily reverse these rulings, pare back First Amendment protections, and

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[20] *Amici* strongly believe that such donor inquiries deserve truthful and accurate answers. If a solicitor misleads a donor in answering such a question, he is clearly liable for fraud.

In fact, it appears that Petitioner *already* had the elements necessary for such a *prima facia* case. One donor specifically asked how her donation would be spent and was told that "90% or more goes to the vets." Record 358. It also appears that Petitioner had enough evidence to file a *prima facia* case against Respondents for self-dealing and/or breach of fiduciary duty for their practice of negotiating on behalf of themselves and on behalf of VietNow in the same transaction. Am. Compl. ¶¶ 12-13. Record 5

It is strange, then, that Petitioner chose to challenge long-standing First Amendment jurisprudence when he had what appears to be powerful and uncontroversial evidence of other malfeasance by Respondents. At the very least, this evidence of affirmative misrepresentation and self-dealing undermines Petitioner's assertion that he would be nearly powerless to stop fraud in charitable solicitations if his relief is denied. To the contrary, it appears that Petitioner seeks authority to prosecute cases of "fraud" where no such evidence exists – in other words where there is merely a high CFP.

[21] Schaumburg, 444 U.S. at 632; Riley, 487 U.S. at 796.

[22] Munson, 467 U.S. at 961, 966; Riley, 487 U.S. at 793, n. 7.

thus chill charitable speech.[23] *Amici* believe that these arguments are already well represented to this Court. Rather than join that chorus, *Amici* will point out the other threats to a fundraiser's and charity's constitutional rights that this prosecution entails.

A. Petitioner's relief would effectively compel speech

According to Petitioner's complaint, Respondents must face fraud charges to answer allegations that they misled one or more donors about what portion of their donations would go to VietNow. Therefore, if Petitioner's prayer for relief is granted, to avoid fraud liability commercial fundraisers and charities must necessarily conduct their solicitations such that *no* donor misunderstands how much of his donation is physically turned over to the charity.[24] And if one discloses *this* percentage, then he

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[23] Petitioner claims he is neither arguing that Respondents' fee is *per se* unreasonable (Pet. Br. at 41) or that he is compelling speech (Pet. Br. at 46-49). But the facts belie this. In his Complaint, Petitioner does characterize the fee as unreasonably high (Am. Compl. ¶¶ 32, 43, 70-72. Record 11, 13, 321-322) and he does fault Respondent for not disclosing his fee during solicitations (Am. Compl. ¶¶ 38, 67F-67N (52-61). Record 12, 209-212.)

More importantly, the prosecution theory that Petitioner seeks to vindicate necessarily relies on either or both of these unconstitutional concepts. The only way for fundraisers to immunize themselves against fraud suits under Petitioners' theory is to disclose their CFP during solicitations. It is unconstitutional to institute such a requirement. Riley, 487 U.S. at 799-800.

At the same time, there is an implicit ceiling on "reasonable" fees. If Petitioner can bring a fraud action whenever he can gather a certain number of affidavits stating that donors would not have given if they knew the CFP was "that high" (and there's no reason to believe the minimum number of affidavits is not one), then there is a ceiling on reasonable fees determined by the local community. This, too, is unconstitutional. See, e.g., Schaumburg, 444 U.S. at 636-637.

[24] This position assumes that only funds actually turned over to the charity advance the charitable mission. This Court rejected that

necessarily discloses the percentage that is *not* turned over to the charity. This is precisely the type of compelled speech declared unconstitutional in Riley.[25]

There are numerous reasons why this Court found such compulsion to be both poor policy and unconstitutional. They are briefly listed, *supra*, on page 7. All of these reasons are still valid today. Petitioner simply cannot compel speech, whether through legislative enactment or through the threat of prosecution.

B. Fundraisers would never know what is illegal

Under Petitioner's theory, a solicitor is committing fraud if he fails to voluntarily disclose to a donor that a substantial portion of the donor's contribution will be used to defray the costs of solicitation. Thus, Petitioner assumes that a solicitor will have in mind at least a reasonably accurate estimate of how donations will be allocated, and in particular a good idea of what the CFP will be, *when he makes the solicitation*. But in many cases, this is simply not possible.

A review of fundraising contracts filed with the states (which are publicly available) shows that most fundraisers are compensated on a fee-for-service ("FFS") basis rather than on a percentage basis. In other words, rather than receiving a percentage of every donation raised, the fundraiser is compensated for every donor to whom he talks, or every hour he talks, or every direct mail solicitation upon which he consults. Thus, even if the parties may have an estimate of what the fundraising expenses will be before a

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proposition at Riley, 487 U.S. at 798. N.B. Recall that fundraising consultants never receive donations. Instead, contributions go directly to the charity as the consultant merely advises the charity on solicitation strategy and technique in return for a fee. How then should a consultant immunize himself when the charity makes the solicitation and neither knows in advance what percentage the fee will be of the funds raised?

[25] Riley, 487 U.S. at 800.

solicitation campaign begins,[26] they have no idea how many donations will be made. The campaign could be very successful or it could be an abject failure, often because of factors beyond the control of either the charity or the fundraiser. If many donations are received, the cost of fundraising percentage ("CFP") will be low.[27] If few donations are received, the CFP will be high.

There are numerous factors affecting the success of any charitable solicitation campaign. Although the charity and fundraiser have a wide variety of fundraising media from which to choose, their success is often dictated by factors beyond their control. The weather is an example. A charity could engage a fundraiser to plan and manage a fundraising event such as a charity auction, a ball, or a dinner with a featured speaker. The charity could pay or commit to pay for facility rental, catering deposits, decorations, invitations, and any number of other expenses. But if a storm strikes on the day of the event, the charity might raise very little money beyond expenses, which would give it a high CFP. In fact, it could very well lose money, which yields a CFP greater than 100%. The uncertainties do not end with the weather.

Charitable fundraising is affected by myriad factors. Does the charity have an established "brand name?"[28] Does

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[26] This would be ascertainable, for example, if the charity and the fundraiser agreed to send out a certain number of solicitation letters and the fundraiser was paid a certain amount per letter mailed.

[27] This, of course, assumes that the CFP can be calculated in some rational, objective manner. For the difficulties associated with this endeavor, see Brief *Amici Curiae* of Association of Fundraising Professionals et al. section II.

[28] It is much easier for the American Red Cross to raise money than for the Brand X Disaster Relief Society. Even as venerable an organization as the American Cancer Society was a "startup" at some point. The American Cancer Society was founded in 1913. Until 1943, the Society was "chiefly concerned with the improvement of treatment facilities and the professional education of physicians" and spent nothing on research. Lawyer Emerson Foote "found the organization unbusinesslike and incapable of conducting a first-rate fundraising drive" in 1944. Mary

the charity have and can it use a significant base of volunteers to defray the administrative costs of running a charity and soliciting donations? Did the charity start out with a government or foundation grant that makes its CFR look low at the outset? Is the charity popular?[29] And there's the biggest "X-factor" of all: timing.[30]

Thus, FFS fundraisers operating in good faith and with no intent to defraud – indeed, operating with the understanding that their anticipated overhead costs are reasonable – could, through no fault of their own, become liable for fraud. Under Petitioner's theory, if donors discovered that the CFP was dramatically higher than they expected, and then decide that they would not have donated had they known the final CFP when they were originally solicited, the fundraiser and/or charity would be liable for fraud. Petitioner's theory has no room for explanations, qualifications, weather emergencies, context, or

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Lasker personally retained a professional fundraising firm to help the 1945 campaign on the condition that a mere 25% of the funds raised be earmarked for cancer research. Thus, an outsider advanced funds for the charity's first big campaign and this campaign was run by an independent for-profit fundraising counsel. Rettig, Cancer Crusade: The Story of the National Cancer Act of 1971 at 20-21 (1977).

[29] For example, in the early 1980s AIDS charities were viewed with suspicion, but today they are well accepted and have many loyal donors outside the communities initially believed to be affected by the disease.

[30] Prior to September 11, 2001 Islamic charities soliciting donations in the United States did not raise too many eyebrows. Today, suspicion and mistrust hamper their fundraising efforts.

The effects of some of these factors can be estimated before solicitation campaigns begin. Even so, the charities have no control over them and Petitioner's prosecution theory would arbitrarily make them more liable to a fraud charge merely because they were less well known, had fewer volunteers, had never received a grant, etc.

understanding.[31] It merely compares actual CFP with donor's expectation.[32]

Fundraisers operating under percentage-based contracts would face similarly pervasive liability, but for different reasons. As argued in Brief *Amici Curiae* of Association of Fundraising Professionals et al., there are numerous uncertainties in calculating the CFP. A fundraiser operating under a percentage-based contract could take into account all the public education work and any other efforts furthering the charity's mission, come up with a good faith CFP, and perhaps mention it during solicitations. He could then be subject to fraud prosecution under Petitioner's theory in at least three situations.

First, after contributing, a donor could calculate the CFP using his own ideas about what is included and excluded from the calculation and using information disclosed by the charity or the fundraiser or both. If the donor's CFP differed significantly from the fundraiser's CFP (which is entirely possible given the many ways in which a CFP can be calculated from the same data) the fundraiser would now be guilty of fraud under Petitioner's theory.

Second, a regulator or watchdog could have calculated the CFP using his own terms, or simply taken the percentage from the contract[33] without accounting for the

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[31] *Amici* Council of Better Business Bureaus, Inc. et al. admit this in their brief at page 24.

[32] Even if fee-for-service ("FFS") fundraisers used their CFPs from past years as an estimate in current solicitations, they would not escape this pervasive liability. If something went wrong in the current year and the CFP changed, as it invariably does, the fundraiser would be committing fraud, under Petitioner's theory, with respect to donors who were told about the previous year's CFP and whose donations were spent according to a new, higher CFP.

[33] Incidentally, Petitioners and other states implicitly discriminate against charities that must raise money through percentage contracts. The federal government allows charities to report "joint costs" – costs which are attributable to program services, "management and general" expenses, and to fundraising – and allocate them to these three categories on their

fundraiser's work advancing the charitable mission, and conveyed it to the donor, as happened in this case. The donor, faced with new information from a supposedly unbiased and knowledgeable third-party will likely accept it at face value and consider himself defrauded.

Third, the fundraiser could elect not to mention the CFP at all and the donor could decide after the fact that the CFP was higher than he expected it to be.

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annual information return to the Internal Revenue Service. (See IRS Form 990, Part II. Many states accept a copy of the Form 990 in lieu of a separate financial report from charities. Petitioner requires charities to file a copy of their Form 990 in addition to another Illinois-specific annual report form.) However, joint cost allocation is done pursuant to a rule promulgated by the American Institute of Certified Public Accountants which allows joint allocation of costs in FFS contracts but not in most percentage-based contracts. AICPA, Accounting for Costs of Activities of Not-for-Profit Organizations and State or Local Government Entities that Include Fund Raising, Statement of Position 98-02, para. 10.

Thus, many states have adopted a rule that necessarily overstates fundraising fees in percentage-based contracts that obligate fundraisers to perform public education work for the charity. This misleads the public into thinking that these charities spend more on fundraising than they actually do.

This also discriminates against charities which must use percentage-based contracts. Although there are many reasons to avoid such contracts (See, e.g., http://www.afpnet.org/content_documents/2002_AFP_Code_of_Ethics.pdf .), many new charities without grants or other "seed money" have little choice.

> Small or new nonprofit organizations that lack the expertise or resources to conduct their own campaign may prefer to negotiate an incentive contract [with an outside firm] as a way of shifting risk onto those better able to bear it … if the campaign is more successful than anticipated, the nonprofit must give up an extra share of net receipts. In effect, this extra payment is an insurance premium. Steinberg, Profits and Incentive Compensation in Nonprofit Firms, Nonprofit Management and Leadership, vol. 1 #2, Winter 1990, 137.

The ultimate result of all this is that no fundraiser, whether he operates on a FFS basis or on a percentage basis, will be able to raise money in good faith without exposing himself to fraud liability. This is unconstitutional. Even fundraisers are entitled to know what the law is before they take action.[34] They cannot be held accountable because their actions, which were perfectly honest and legal at the time, appear fraudulent by fiat of a regulator's hindsight. Yet this is precisely the standard by which Petitioner seeks to judge fundraisers, both those operating under FFS contracts and those operating under percentage-based contracts.

Because the final CFP under a FFS contract is especially unpredictable, these appeals will be chilled most. Thus, charities will be more reliant on the "unethical" percentage-based contracts[35] simply because the CFP is more foreseeable, although frequently higher.

In the world into which Petitioner invites us, charities and fundraisers stand perpetually on a trap door, waiting to plunge into oblivion at any moment. They could be operating in good faith, complying with constitutionally sound registration, reporting, and disclosure laws, and entirely innocent of even any *intent* to defraud. Suddenly, they can be haled into court to prove their innocence, all the while suffering incalculable damage to their reputation and incurring stiff legal bills to protect their First Amendment right to communicate with the public.

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[34] See, e.g., Rose v. Locke, 423 U.S. 48, 49 (1975) (holding that "[i]t is settled that the fair-warning requirement embodied in the Due Process Clause prohibits the States from holding an individual 'criminally responsible for conduct which he could not reasonably understand to be proscribed'"). See, also, Bouie v. City of Columbia, 378 U.S. 347, 352 (1964) (holding that "[t]here can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language").

[35] See *supra* note 33.

IV. Petitioner seeks too much discretion

Throughout this case, Petitioner seeks to vest a dramatic amount of discretion in the state. He claims the discretion to determine how the CFP is calculated. He claims discretion to determine what fundraising fees are reasonable. He claims the discretion to determine when solicitations are substantially misleading. He claims discretion to determine when he has enough evidence to send out survey affidavits. He claims discretion to determine when he has enough executed survey affidavits to serve a complaint. In all, and considered along with the implications of the theory he seeks to impose, this is a power of dramatic scope and reach. It seems reasonable to ask whether Petitioner will exercise this discretion fairly and impartially.

It appears that Petitioner may have a political test for fraud prosecutions. Petitioner claims that Respondents' fee was too high and fraudulent when VietNow received only 15% of the money raised. However, Petitioner had no such objections to an Illinois charity fundraising event that only passed 17% of the money raised along to charities.

This Illinois millennium gala was quite misleading by the standards proffered by the Attorney General. Donors were told it was a "charity ball" and that the proceeds would go to charity. Donors paid $500 or $1000 to attend and they were informed that they could take a charitable tax deduction for all but $250, which was the fair market value of the meal and entertainment. A reasonable donor could easily assume that if the value of the meal and entertainment was $250, then the remaining $250 (of the $500 ticket, or 50% of the donor's payment) or $750 (of the $1000 ticket, or 75% of the donor's

payment) paid would be donated to charity.[36] Nevertheless, only 17% of the revenue ever went to charity.[37]

Much of the rest was spent on fundraising fees and expenses. A well-connected full-time state employee already earning $100,000 annually was paid an additional $43,800 (more than double the money that went to one charity) to organize the single event. $145,000 was spent on catering. $350,000 was spent on one entertainer alone.[38]

There is every indication that the fundraiser allowed donors to believe that a substantial portion of their ticket price would go to charity, when, in fact, only 17% did. Yet the Attorney General refused to investigate the matter.

It is unclear why this event was never investigated or prosecuted for charitable fraud. The Attorney General explained that "the amount of money we're talking about that was spent on overhead expenses and vendors … given the nature of the event, doesn't suggest they've run afoul of the law, which would prompt this office to do something. If there's information beyond that, give it to us."[39] And this may be a reasonable explanation,[40] but some concern was expressed that no investigation was undertaken because the gala's host, Illinois House Leader Lee Daniels, was a "key supporter of [Attorney General] Ryan's bid for governor."[41]

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[36] And he would find a sound foundation for this belief in the Internal Revenue Code and Regulations. 28 U.S.C. § 6115 (2003)

[37] Novak and McKinney, Ryan Benefit Ball Gave Just 17%, Chicago Sun-Times, September 10, 2001.

[38] Ibid.

[39] Ibid.

[40] Although it seems a similarly reasonable explanation could be made for Respondents, to wit: they conducted and paid all expenses for VietNow's public education campaigns; they recruited new donors each year; and the independent, uncompensated board of directors was pleased enough with the arrangement to renew the contracts. This sounds at least as reasonable as the Attorney General's explanation for the millennium gala, particularly since there is no evidence that Respondents spent as lavishly as the "charity ball" spent on catering and entertaining.

[41] Ibid.

This unexplained difference in treatment of the instant case and the millennium gala raises the question of whether, under Petitioner's theory of fraud, some fundraisers will be exempt from prosecution by various state Attorneys General and, conversely, whether others will be singled out for prosecution based on their political ties, political beliefs or persuasions, or lack thereof.

Petitioner argues that his prosecution theory will not "invite arbitrary prosecution of charities whenever the Attorney General believes their fund-raising expenses are 'unreasonable.' What is important under the law of fraud, and what Illinois alleged here, is not what the Attorney General *believes* in the abstract, but what the *victims specifically* understood based on what Respondent *actually told them*."[42]

Again, the facts undermine Petitioner's claim. The genesis of this case was *Petitioner's* belief that Respondent's public education work on behalf of VietNow was negligible or a sham. *Petitioner* believed that Respondent's contractual fee represented compensation for fundraising and nothing else, despite the contracts in his possession proving the contrary. Petitioner then sent out survey affidavits that misled donors into believing that "80% or more of [the donor's] donation would be used for professional fund raising expenses."

It is particularly difficult to believe Petitioner's claim that his relief would not "invite arbitrary prosecution of charities" when one compares the dogged, decade-long prosecution of this case through four courts to the utter indifference Respondent showed to investigating the "charity gala" which turned only 17% of funds raised over to charity but was sponsored by a key political supporter. Overall, it

[42] Pet. Br. at 28 n. 23 (emphasis in original).

appears that Petitioner's theory accretes far too much discretion in his office to pass constitutional muster.[43]

In the end, Petitioner seeks to subject *every* charity or commercial fundraiser soliciting contributions from the public to fraud liability at *any* time. His power would be circumscribed only by his own discretion, and he seeks the same license for every other state and local prosecutor in the United States.

CONCLUSION

Under the jurisprudence of Schaumburg, Munson, and Riley, and for the foregoing reasons, Petitioner cannot constitutionally premise a fraud complaint on a cost of fundraising percentage and his relief should therefore be denied.

Respectfully submitted,

Charles H. Nave
Counsel of Record

[43] See, e.g., Smith v. Goguen, 415 U.S. 566, 575 (1974) (invalidating a "standardless" legal theory that "allows … prosecutors … to pursue their personal predilections.) See also, City of Chicago v. Morales, 527 U.S. 41, 63-64 (1999).

APPENDIX:
Amici Curiae

Abbe & Associates:
Philanthropy Solutions
Arlington, TX

Adams, Hussey &
Associates, Inc.
Washington, DC

Amergent
Peabody, MA

Black Mountain
Communications, Inc.
Scottsdale, AZ

Carl Bloom Associates,
Inc.
New York, NY

Charitable and
Philanthropic Management
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No. 01-1806

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In The

Supreme Court of the United States

JAMES E. RYAN, ATTORNEY GENERAL OF ILLINOIS,

Petitioner,

v.

TELEMARKETING ASSOCIATES, INC., ET AL.,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Illinois

BRIEF *AMICUS CURIAE* ON BEHALF OF HUDSON BAY COMPANY OF ILLINOIS, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Hudson Bay Company of Illinois, Inc. ("HBC") is a for-profit fundraiser and political consulting firm which began business in the early 1970's. Its founder, Marc Anderson, was also the founder of Citizens for a Better Environment, the plaintiff who sued Schaumberg, Illinois in the U.S. Supreme Court case which bears those parties names.[2]

HBC operates a telephone canvassing center in Lincoln, Nebraska where approximately 95 canvassers make telephone calls for about 32 non-profits and candidates for public office in 44 states. These non-profits advocate various environmental, consumer, civic, political, and social causes. The greatest number of HBC's callers are undergraduates or graduate students, most commonly in political science or international relations, at the University of Nebraska. HBC also operates phone canvass centers in New York City, Cleveland, Tampa and Indianapolis, as well as door-to-door "field" canvasses in twelve other States.

Many present and former HBC clients are household names, including:

- Michigan and Colorado Clean Water Action
- Former U.S. Senator Paul Wellstone

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[1] Letters indicating the parties' consent to the filing of this brief have been filed with the Clerk of Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its counsel, or its members made a monetary contribution to the preparation or submission of this brief.

[2] *Schaumburg v. Citizens for Better Environ.*, 444 U.S. 620 (1980).

- Ohio Civil Liberties Union
- National Abortion and Reproductive Rights Action League, for Michigan, Ohio and Georgia
- Ohio Citizen Action
- Florida Consumer Action Network
- Government Accountability Project
- Defenders of Wildlife, New York
- Organic Consumer Association
- Minnesota Civil Liberties Union
- Two Michael Dukakis for President Political Action Committees
- Florida National Organization for Women
- Congressman Mark Udahl
- New York and Texas Citizens Campaign for the Environment
- Michigan Consumers' Federation
- Colorado Gubernatorial Candidate Rollie Heath
- Sierra Club, Dakota Chapter
- Many others

HBC offers a menu of services to these candidates and organizations, including:

- Database Management Printing – Production of mailing labels
- **Voter Identification Surveys**
- Door-to-door canvassing
- **Fundraising**
- Hiring and training advice
- **Public education on client issues**
- **Alerting clients' members to contact legislatures or other government officials on pending issues**
- **Membership Drives**
- **Get-Out-The-Vote drives**
- **Membership and donor renewal**
- Media relations
- Job placement
- Speech and op ed writing
- Mailing

Six of these services, highlighted in bold above, rely primarily on one-to-one telephone contact. HBC telephone canvassing often involves fundraising, but not always. Each client's telephone canvass usually has several goals. Fundraising is often, but not always, one of them. For example, clients hire HBC to conduct voter identification surveys, get-out-the-vote drives, membership renewal, and to urge members to contact legislators on issues important to the client and its members and donors. The cost of calling for these purposes is frequently defrayed by a solicitation for funds as well, but sometimes, as in an emergency, there may just not be time for the fundraising message in the call or the fundraising may just not be worthwhile, given the nature of the audience to be canvassed.

In 30 years of activity of this kind, HBC has never been accused of fraud. But HBC recognizes the need, as well as its self-interest, to prevent fraud in connection with fundraising.

Despite being technically "for profit," HBC has never paid a dividend and its books are open to all of its clients and any of their members who may wish to examine them. For the past 14 years, the president and part owner of HBC has been Dave Anderson, Marc Anderson's brother. Before that, for 21 years, Dave Anderson was a political reporter and assignment editor at newspapers in Minneapolis, Detroit and Chicago. He was managing editor of the Chicago Journalism Review, co-author of the First American textbook on investigative reporting and has been an expert witness on media ethics and practices in Minnesota and Michigan. He served four years on the Bio-Medical Ethics Committee at the University of Minnesota Teaching Hospital and has served for two years as a member of the

Human Subject Trials Committee at the University of South Florida School of Medicine.

Anderson and the other two owners of HBC, who have decades of experience at this, are primarily political junkies. They do not look for or accept any sales business, or even charity work. HBC just does politics. And no one gets rich from HBC's work.

HBC is now faced with the prospect for all of its clients of having to calculate and defend the statistic at issue in this case – the ratio of the fees and costs of the telephone canvassing as a percentage of the total amount raised for a client. This costs of funds ratio or "CFR" is admittedly widely, but wrongly, considered to be a meaningful statistic. Many states require that the CFR be calculated, kept, reported or disclosed, even though its worth as a measure of fundraising efficiency was thoroughly and quite properly discredited in *Riley v. National Federation for the Blind of North Carolina, Inc.*[3]

Is it a fraudulent omission for professional fundraisers who advocate for environmental, consumer, civic, political, and social causes to fail to disclose a CFR? After 30 years and literally millions of calls for thousands of clients, HBC has a strongly-held view on this question.

[3] See *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988).

SUMMARY OF ARGUMENT

No fundraiser should be compelled to disclose a CFR because: (1) fundraisers often can't disclose it – they don't or can't know it, (2) the CFR is at best irrelevant and at worst misleading, (3) any government right to make *post hoc* determinations that telephone calls should have included governmentally chosen disclosures has an unnecessary and unconstitutionally chilling effect on the legitimate exercise of First Amendment rights, and (4) the government is not a simple neutral guardian of consumers when it comes to fully protected speech; it is often actively involved with its own political view or even as the target of the speech, and it should not be allowed selectively to punish callers for omitting facts it chooses retroactively for importance.

ARGUMENT

1. Fundraisers Often Don't Know Or Can't Know Their CFR.

Start-up organizations have a host of initial obstacles. Whom to contact? How to get names? How to make contact with people? How to pay for everything? Who will help? These questions rarely have an easy answer. There is no master bulletin board for the whole country.

Assume you sincerely wish to start a new organization to help the Kurds in their struggle to establish an independent, sovereign Kurdish homeland. You must incorporate, hire an executive director, lease premises, develop literature, lobby public officials, etc.

Now assume you have hired very efficient and honest fundraisers who tell you that in order to spread the word on this topic and raise funds for the effort, it will cost, on average, two dollars per call to contact people by telephone (far cheaper than a mailing) to ask them to be members of the organization. What will be your CFR? What would you tell people it is?

Obviously, you cannot know the CFR until after the effort has progressed awhile, the public sympathy for the cause is discovered, and the denominator of the ratio – the gross receipts from fundraising – can be determined.

At the beginning of the effort, of course, all the funds received are used to build infrastructure, buy stationery, produce literature, and generally get the word out. Moreover, at first most of the calls will be unsuccessful at building membership and fundraising. The CFR for the first month will, no doubt, be greater than 100%; it almost always is. That means more is spent on calling than comes in from calling. But you persist.

Eventually, your perseverance would be rewarded. You would be calling mostly committed members, former contributors, and their friends who have heard of and trust your maturing organization. From the calling, you now receive just enough to pay the costs of hiring the callers and pay the other expenses, such as telephones, computers, and the like.

You would be delighted to have achieved a self-funding way of spreading sympathy for the plight of the Kurds. But not so fast. Now that you have been operating a while, you must worry about what mandatory CFR disclosures you might have to make on penalty of fraud for the omission. Should you be warning people in each call

that some large percentage (in this example 100%) of what they donate is "kept" by the fundraisers?

So, you undertake to "warn" respondents about this high CFR in the calling. Upon examination to perform the CFR calculation, you would discover that, in fact, when the organization had a small surplus from the calling it decided to use that surplus to try to build even a larger membership, so it used the funds for still more calling. You would realize that any surplus goes for the calling, and it always will, at least until the Kurds have their own government.

Your CFR is 100%. Calling people to spread the word about the plight of the Kurds is the whole point here. The more successful the organization, the larger the dollars involved, the more fraudulent the large CFR seems. And no one trusts a fundraiser who "keeps" all the money.

So, you decide to create a numerator for the CFR. After all, some portion of the funds are going not just for fundraising but for the purpose of the calling, membership, public awareness and the like. Shouldn't that portion be the numerator if that is what the organization is all about? Okay, how much?

This exercise is not just theoretical. Official governmental forms and statutes still routinely require HBC to engage in this exercise or similar ones, on penalty of perjury, fines, and imprisonment.[4] To complete forms that

[4] Ala. Code §§ 13A-9-70-13A-9-84 (1996); Alaska Stat. §§ 45.68.010-45.68.900; Ariz. Rev. Stat. §§ 44-1271-44-1280; Ariz. Rev. Stat. §§ 44-6551-44-6561; Ark. Code. Ann. §§ 4-28-402-4-28-416 (1999); 1999 Ark. Acts 1198; Cal. Bus. & Prof. Code §§ 17510-17510.95 (1980); Colo. Rev.

(Continued on following page)

require a CFR, HBC has resorted to using observers with stopwatches and clipboards who attempt to time the various topics discussed during the calling. Quite honestly, it's a stupid requirement; there is really no way to measure a CFR in this type of situation, but no non-profit wants to direct its donated funds to litigate the question state-by-state to the exclusion of its stated mission.

Moreover, the CFR for an organization can vary greatly from month to month or year to year. One year the organization may tell its communications people to make fundraising the top priority. At other times it may want to emphasize membership at the expense of fundraising. The

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Stat. §§ 6-16-101-16-16-113; Conn. Gen. Stat. §§ 21a-175-21a-1901 (1983); Fla. Stat. Chs. 496.401-496.426; Ga. Code Ann. §§ 43-17-2-43-17-9 et seq. (2000); Haw. Rev. Stat. §§ 467B-1-467B-14 (1993); Iowa Code §§ 13C.1-13C.8 et seq. (1993); 225 Ill. Comp. Stat. 460/0.01 et seq.; Ind. Code §§ 23-7-8-1-23-7-8-9 et seq. (1999); Kan. Stat. Ann. §§ 17-1759-17-1775 et seq. (1989); Ky. Rev. Stat. Ann. §§ 367.650-367.670 (1994); La. Rev. Stat. Ann. §§ 51:1901-51:1909 (1997); Me. Rev. Stat. Ann. tit. 10, §§ 9-5001-9-5016 (1999); Mass. Gen. Laws. ch. 12, §§ 8-8M and ch. 68, §§ 18-35; Md. Code Ann., Bus. Reg. § 6-101 et seq. (2000); Mich. Comp. Laws §§ 400.271-400.294 (1975); Minn. Stat. § 309.501 et seq. (1996); Mo. Rev. Stat. §§ 407.450-407.469 (1986) and Mo. Code Regs. Ann. tit. 60, § 60-3.010 et seq.; N.C. Gen. Stat. § 131F (1994); N.H. Rev. Stat. Ann. § 7:28-c (2002); N.J. Stat. Ann. §§ 45:17A-1-45:17A-40 (1994); N.Y. Exec. Law § 171-a et seq.; Ohio Rev. Code Ann. §§ 1716.01-1716.99 (1999); Okla. Stat. § 552.1 (1999); Or. Rev. Stat. §§ 128.801-128.995 et seq. (1991); 10 Pa. Cons. Stat. §§ 162.1-162.24 (1990); R.I. Gen. Laws § 53.1-1 et seq.; S.C. Code Ann. §§ 33-56-10-33-56-200 et seq. (2000); S.D. Codified Laws §§ 37-30-137-30-29 (1991); Tenn. Code Ann. §§ 48-101-501-48-101-522 (1996); Utah Code Ann. §§ 13-22-1-13-22-23; Va. Code Ann. §§ 57-48-57-69 (2002); Wash. Rev. Code §§ 19.09.010-19.09.915 (1993); Wis. Stat. § 440.41-440.48 (1999) and Wis. Admin. Code § RL 5.01; W. Va. Code §§ 29-19-1-29-19-15b (2001); N.D. Cent. Code §§ 50-22-01-50-22-05 (1999); Okla. Stat. tit. 18, §§ 552.1-552.18 (1999).

state of the national economy creates large swings as well, as do specific events. (As a result of the terrorism on September 11, 2001, almost half of HBC's clients incurred a severe decrease in fundraising as many people focused their political donations elsewhere.)

Even the same issues vary as to their public appeal (and resulting CFR) over time. Imagine fundraising for highway beautification projects before the anti-littering campaigns in the early 1950's. Our hypothetical Kurdish organization's CFR would greatly improve once the reasons for the U.S. and British no-fly zones (designed to protect the Kurdish population in Iraq) became the subject of national media attention.

Dramatic changes can occur even weekly. HBC was hired by the Committee to Reelect Paul Wellstone in March of 2001. The list of people to call was a "dead" list consisting exclusively of those who had not responded to two earlier mailings. HBC could not know whether the amount raised would cover the cost of calling people who had already failed to respond.

As it turned out, between the start of the calling and the end of the campaign, the net received for the client, after expenses, changed from one-third of the gross amount received to three-quarters. During that period of time, what should HBC have told people the CFR was? The calling for Senator Wellstone's campaign had other purposes besides raising money, of course, including raising volunteers – over 200 active volunteers in this instance. Calling that "dead" list produced almost $1 million for that campaign but there were many other benefits.

A valuable part of a telephone canvass for any organization is the member and donor feedback. Many HBC clients include survey-type questions as part of the calling. When this happens, HBC revises downward any projections about fundraising because of the extra time spent on each call.

As one would imagine, the callers become quite expert on which issues members support wholeheartedly and which they disagree with or are only lukewarm about. This feedback is essential to guide organizations' agendas. Debriefing callers regularly is an indispensable procedure for a non-profit but this valuable feedback costs money and further increases the CFR.

Under these circumstances, what is a "good" CFR? What may be one Attorney General's conception of an acceptable CFR at one time may not be another's a short time later, or even at the same time. Your calling for the pro-Kurdish organization would be continually under threat of penalties but what could you do to avoid them? Call more, call less – neither would have any effect on your CFR. And telling people about your cost of funds ratio or its meaninglessness only serves to increase it.

In your new pro-Kurdish organization, it would be likely that for a long time every nickel of funds would go just to winnowing for a large, sympathetic membership list. And you have no funds to begin. What you need is for the fundraiser to take a chance on you. Let the fundraiser pay the payroll and expenses for a large calling effort and then recoup the expenses and fees later from the larger organization that such calling might build. So, you can guarantee by contract with the fundraiser that 15% of the

funds raised will be directed to the organization regardless of whether they are needed to pay the calling expenses.

At 85% the fundraiser might lose money or eventually make money, depending on what people think about your Kurdish cause. Without such a guarantee, the calling has to pay for itself and is likely to fail at first. With such a guarantee the professional fundraiser takes the risk that the calling won't pay for itself but promises to call anyway. This is just what you would need if you are ever to get sympathy for a Kurdish homeland and want to minimize the risk of the entire awareness effort aborting early for lack of cash.

2. The CFR Is Meaningless And Irrelevant.

HBC has not chosen an unrealistic hypothetical to make its points. The hypothetical is the norm, not the exception. HBC's client, Citizens Campaign for the Environment ("CCE"), for example, provides important leadership in the area of water quality, waste management and public health.[5] That non-profit has been working on specific water issues since 1985 and it has valuable accomplishments to its credit, many of which are revealed on its website.[6] CCE is and ought to be proud of what it has accomplished. (The executive director of CCE is a former New York State Water Commissioner, holds five academic degrees, including an M.S. degree in Water Resources Management from Texas A&M University and is a lawyer.

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[5] www.citizenscampaign.org

[6] *Id.*

About a dozen paragraphs of New York State's water protection code have been written by CCE technical staff.)

When HBC employees call New York citizens on behalf of CCE, they promote legislation, request letters to legislators, renew memberships, inform the public of latent threats to or mismanagement of their local water resources and explain what can be done locally. Funds are usually solicited in the call, but the information exchanged in the telephone call is, as often as not, the primary purpose for the call. The request for funds in a call enables the next call.

The funds also pay for the salaries of CCE staff who sit on or monitor local water quality commissions and the like and do the legwork, research, and administrative work, and lobbying of the organization. The track record is good, the organization is valuable, fraud is not involved, and donations are voluntary. HBC's calling for CCE is similar to a get-out-the-vote campaign where the fundraising is for the calling; the calling is not for the fundraising.

Some of the most important threats to public health are the least glamorous for fundraising. If the Kurdish predicament seems like a far-fetched or difficult issue about which to call people, then try calling on sewer and wastewater issues as CCE must do.

The CFR for organizations with causes like these are truly unknowable because the very concept silently assumes that raising funds is the ***only*** purpose of calling. No one should have to worry about such a bankrupt, nonsensical concept.

With organizations like CCE, what is a "good" CFR? If CCE's members are satisfied with its operation, does

anything else matter? To come up with a figure for the CFR, no matter what it might be, would be misleading because that would falsely imply that the ***sole*** purpose of the calling is fundraising. This may be the case for some charities but is almost never the case for pure political organizations or candidates. Many charities have a legislative agenda or a public education mission and their CFR reflects that mixed use of their funds.

Churches routinely claim a CFR of well under 10%. Yet they pay their clerics, provide them parsonages, and define a large part of their clerics' duties to raise funds. Should religious leaders be compelled to disclose the church CFR before they pass the collection plate? And how shall that CFR be calculated?

Some organizations brag that they do not hire professional fundraisers. The AARP does this in its *amicus* brief in this case. Mostly what that means is that they hire fundraisers (which they label "development directors") in house on their own payroll. But these people perform essentially the same fundraising service at the same cost. They maintain the donor lists, make the contacts, update the records, file the registrations and financial statements with the States and everything else other organizations hire outside private firms to do. In Petitioner's Illinois' lexicon, they "keep" the same percentage of the donations as if these functions were outsourced to HBC or any other professional fundraiser.

Remarkably, all of the Petitioner's arguments would apply in the case at bar if VietNow got 25% of the donated funds, or 60% or 85%. Under Petitioner's proposed definition, ***all*** such fundraising efforts would be fraud. Who would determine what percentage is evidence of fraud and

what percentage is not? Will juries be instructed to take into account the age of the organization, the popularity of its causes, which fundraising expenses were out-sourced, and so forth? Who would risk calling under such an unspecific, vague, and harsh threat?

VietNow or its fundraiser might have committed serious fraud in countless ways. But their CFR is among the least likely ways of measuring or preventing it. The CFR concept is a persistent, irrelevant, and pernicious meme. Failing to mention it when calling is the only honest thing to do.

3. The Burden And Chilling Effect On First Amendment Activities Is Intolerable.

It's a free country. But HBC is not free just to pick up the phone and call people to advocate for its clients. The States and the Federal government have an array of consumer protection laws that contain a myriad of confusing and inconsistent requirements.

HBC does not have to wonder whether the cumulative burden of these requirements chills protected speech. It experiences that chill first hand, every day. HBC routinely decides not to call into States where the burdens of compliance with consumer protection are too great. HBC also refuses to accept clients where the price of these well-meaning but overly-protective regulations is just too high. The result is that the residents of the affected State just do not get to participate in whatever cause is currently at issue.

For example, Kentucky requires a written filing before calling.[7] The filing requires HBC to list (in conviction search and related forms) the name, address, Social Security numbers, and description, including identifying birth marks and tattoos of each of the University of Nebraska students that HBC hires to call into that State. When calling, callers must use their actual names (frightening to many young female callers). The language of the Kentucky requirements (and many other States) is so harsh and threatening that, in fact, the administrative assistant who used to handle most of HBC's filings became afraid for her liberty (penalties for inaccurate filings include incarceration) and HBC had to hire an attorney – at a cost of about 25% of the net fundraising receipts – to handle the intimidating state pre-registrations. No fraud was at issue or alleged – the attorneys were needed just for the red tape.

Of course, the HBC clients, themselves, must also register State by State before calling, and they also routinely hire lawyers to guide them through that process. (If you have the idea that you want to call people to help free the Kurds, you better plan on weeks or months of paperwork, notaries, bonds, balance sheets, audits and the like.)

Of course, no one wants to spend valuable donated resources challenging these regulations. It is easier for the client and the fundraisers just to avoid the harshest States such as Kentucky, if possible.

National Citizen Action – a now inactive public-interest citizen organization – was an HBC client concerned with environmental issues and often intervened in

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[7] Ky. Rev. Stat. Ann. §§ 367.650-367.670 (1994)

public utility rule and rate making. It had to abandon its efforts in Kentucky in 1994 because that State's registration process was just too costly and time consuming. Every time it hired a new canvasser, or one left, it had to amend its Kentucky registration. And it was almost impossible, and therefore risky, for them to make the estimates that were required as to what their gross receipts and net receipts would be in the next fiscal year.[8]

No Kentucky residents complained that they were being left out of the national debate on important civic topics, but then no non-profit could afford to call to warn them about that issue either.

According to the relevant Georgia Statute, any professional fundraiser who raises more than $50,000 in the state must file a certified financial statement prepared by an independent certified public accountant, duly registered and in good standing.[9] Because HBC raised more than $50,000 for a client back in 1994, Georgia will not let HBC register or call until it provides Georgia with this audited financial statement. Georgia NARAL, a non-profit advocacy group concerned with abortion issues, wanted to, but could not, use HBC callers because of this regulatory burden. The cost for an audit then was about $12,000, about half what the organization was expecting to raise. The size of this non-profit's membership surely reflects this setback.

In New York, the relevant legislation requires a $10,000 bond and an $800 annual registration fee, and an

[8] *Id.*

[9] Ga. Comp. R. & Regs. R. 590-9-2-.02

$80 annual per caller fee as a prerequisite to HBC's advocacy-type calling.[10] HBC was asked to help Defenders of Wildlife, a non-profit advocacy group concerned with saving wildlife at risk by, for example, fighting against liberalizing changes to the Endangered Species Act.[11] Even if HBC had registered only 50 of its callers per year, that would be $4,800 in fees as well as the bond. According to the Charities Bureau of New York, HBC would have to send in $3,200 in registration fees as well as a bond for each year, 1996 through 1999, before HBC could even register for the current year.

Needless to say, the Defenders of Wildlife will have to find some other way to update New Yorkers about how they can help reduce the risks to dolphins and wolves. New York has made sure there is no telephone fraud by simply eliminating the telephone calling. This is not unusual.[12]

There is irony here. The greatly increased cost of complying with such rigorous consumer protection only makes the affected organizations more attractive targets for Attorney Generals focused on the proportionally increased CFR.

[10] N.Y. Exec. Law § 171-a et seq.

[11] www.defenders.org

[12] See Tenn. Code Ann. § 48-101-503 (1996) (Tennessee, $25,000 bond and $800 fee); S.C. Code Ann. § 33-56-30 (2000) (South Carolina, $15,000 bond and $50 filing fee); N.C. Gen. Stat. § 131F (1994) (North Carolina, $20,000 bond and $50 filing fee) Utah Code Ann. § 13-22 (Utah, $250 filing fee, and the bank funds must be deposited physically in Utah).

Unfortunately, the pre-calling registration, the fees, the bonding, and the audits, are only the beginning. There are also separate rules compelling what must be said during the calling itself. These rules are difficult to follow because calling relative strangers by telephone and trying to engage them in a conversation about sewers or endangered dolphins is, by nature, a process in which the caller does not have a great deal of control over how long the call will last. Think "click".

In Colorado, for example, in addition to pre-calling registration, the law requires HBC's paid canvassers to state during the call the fact that they are paid canvassers, whom they are working for, which organizations they are calling for, whether any contribution would be tax deductible, and, if requested, the CFR and the registration numbers of the organization and of HBC.[13]

But there's more. If a caller has managed to survive all the Colorado affirmative disclosures without a hang up, brand new Federal Trade Commission regulations require that, if any funds are asked for, callers "promptly" state that "***the*** purpose" of the call (as if there were only one purpose) is to solicit a donation.[14]

Assuming you had properly registered, bonded, and paid your fees before calling, would you choose Colorado as a place to start your awareness message about the Kurds? In Colorado, and many other states, it would be easier to ride horseback through the streets shouting about them.

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[13] Colo. Rev. Stat. § 6-616-105.3.

[14] See 16 C.F.R. 310.4(d).

Illinois is not satisfied with its current statutory scheme. It wants the right to subject fundraisers and callers to the *in terrorem* effect of a *post hoc* determination that, in addition to everything else they must or want to mention, they should have also talked about the expected CFR they were creating. Callers need to allocate some of the precious time they have on the phone to the actual message. Calling for grassroots organizing is already over-regulated. Asking HBC and its clients to guess, client by client, issue by issue, month by month, whether their expected CFR's must be mentioned in the few seconds they are allowed to talk to people on the phone is an intolerable chill on free speech – especially when added to the extant burdens, risks and costs – even if the CFR information were meaningful.

Why does Illinois pick only on the CFR? Surely there are more important things that also need to be disclosed. For many local organizations, half of what is raised must go to the national organizations of which they are only a chapter. Shouldn't that be disclosed?

Wouldn't the following disclosures be just as fraudulent if omitted: "This organization is only two weeks old and has no real track record of success at anything." For our pro-Kurdish organization the callers better affirmatively disclose – after all the other governmentally required messages – "This organization is still quite small and has failed, so far, to convince any governmental officials or U.N. representatives to support the concept of a Kurdish homeland." Or for any given religious solicitation, "This religion's teaching of a heavenly reward for your donation cannot be confirmed."

Here is the point: Please do not let the government retroactively select what information speakers should have disclosed. There would be no stopping this arbitrary picking and choosing and callers would be pressed to try to include a full verbal prospectus into the 30 seconds that the average phone call lasts – if they try to call at all.

4. The Government Is Not A Neutral Referee.

Attorneys General are not the only elected officials in a position to charge fraud for failing to mention a CFR during telephone calls. HBC and its clients are also faced daily with the well meaning zeal of the Federal Trade Commission, secretaries of state, district attorneys, city attorneys and other officials of all sorts. In a broad campaign, such as the calling for former U.S. Senator Paul Wellstone, this meant dealing with hundreds of governmental officials, each with the power to charge fraud if, in his or her opinion, the CFR was not mentioned during the phone calls into his or her jurisdiction.

These public officials have power and many are not afraid to use it. Not all zeal is well meaning. In 1991, HBC was trying to help National Campaign for the Environment (an affiliate of CCE with a similar grassroots program) build its membership in South Carolina. Their plans came to a halt when the Secretary of State and the Attorney General of that State refused NCE's pre-calling registration forms and insisted that all calling immediately cease. The State officials threatened criminal enforcement (for calling without pre-filing).

The reason offered by the officials was a predictably large CFR. They insisted that no funds would leave the State for an out-of-state organization on their watch. And

the officials publicly campaigned for re-election on that issue.

Only when the officials were personally sued in Federal District Court under 42 U.S.C. § 1983 for a denial of civil rights (and after their staff were privately assured that the "biodiversity" the callers were talking about had nothing to do with the civil rights movement) did they finally relent and allow South Carolina residents access to NCE's membership and program. No fraud, just a high CFR and two years of federal litigation.

The power sought by Illinois in the case at bar is not only too vague and too hazardous to the rights of legitimate organizations and their members, the power is wielded by far too many politicians to be predictably employed.

Sometimes the calling is about the government, itself. In 2000, some of the residents of Brooklyn Park, Minnesota learned that their City Council was about to approve a zoning change that would have allowed a favored developer to build a huge outdoor amphitheater in the middle of a residential zone in that city. The City Council was convinced that the City was starved for culture and needed such an amenity. The residents in the zone were convinced it would be a nuisance and produce nightly noise pollution.

With only a few weeks notice, the residents had to get the word out throughout the zone that the City Council's vote on the zoning change was coming. There was no time, no money, and not nearly enough volunteers to notify everyone affected. So, the neighbors quickly formed a non-profit corporation and hired HBC to call and tell the

thousands of homeowners about what was to happen in their part of the city.

The HBC callers, playing Paul Revere, called the affected residents one-by-one, told them about the issue, about the critical upcoming City Council hearing just weeks away, about whom they could contact to get more information or lobby for a different result, and asked for a check so the calling could continue. No other means of contacting so many residents was available on such short notice.

As one might guess, the CFR was 100%. All funds were used, as rapidly as possible, to make more calls (HBC charged its expenses, plus 7%). The project was extremely controversial and the amphitheater was never built. But whether or not it should have been is not the point. The point is that had the City Attorney been allowed to, he would have threatened or begun a prosecution claiming that the out-of-State professional fundraiser, HBC, was fraudulently "keeping" all the money without saying so during the calling.

CONCLUSION

When an organization represents that its funds are used for a specific purpose, everyone understands that not every dollar will be devoted directly to that purpose – that some funds will have to be used for calling expenses, copying, salaries, fees and the like. Everyone also appreciates that some causes are more popular than others. They therefore already know what is necessary to realize that a large CFR does not automatically indicate fraud. But the myth of the big, bad CFR endures.

It is not fraud to be unpopular and have large expenses. It is quite normal. The government should not oblige a non-profit to divide its overhead by its popularity and then make the organization orally report the resulting arbitrary fraction to everyone. Much of the time the data is not even available or is in flux anyway.

The government (all of them) already has the power to pursue non-profits for fraud. Requiring oral CFR disclosures adds a substantial, unnecessary, and illogical burden on those who are just trying to improve things for the rest of us.

There is no denying that older, evolved organizations which have long cultivated their message and their membership lists and have attracted large numbers of volunteers will have a characteristically small CFR. They are the lucky ones. However, a small CFR is not the *cause* of their survival and prosperity, it is only the *result* of those things. And it certainly does not mean those organizations are fraud free.

A large calling CFR might indicate a start-up organization, a membership drive, a difficult or unpopular message, a political-type canvass or many other things, but not necessarily deception.

Each organization must be judged by what it was trying to do and how it tried to do it. There is no universal fraud index.

Dated: January 23, 2003

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IN THE

Supreme Court of the United States

JAMES E. RYAN, ATTORNEY GENERAL OF ILLINOIS,
Petitioner,

v.

TELEMARKETING ASSOCIATES, INC., *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF *AMICI CURIAE* ON BEHALF OF INDEPENDENT SECTOR AND OTHER NONPROFIT ORGANIZATIONS IN SUPPORT OF RESPONDENTS

(List of Other Amici Printed on Inside Front Cover)

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Advocacy Institute
Alliance for Children and Families
Alliance of Nonprofit Mailers
American Association of Museums
American Autoimmune Related Diseases Association (AARDA)
American Cancer Society
American Diabetes Association
American Foundation for AIDS Research (amfAR)
American Foundation for the Blind
American Heart Association
American Lung Association
American Society of Association Executives
American Symphony Orchestra League
Americans for the Arts
ANGELCARE
The ASPIRA Association
Association of Fundraising Professionals (AFP)
The Catholic Charities of Santa Clara County
Center on Philanthropy
CIVICUS: World Alliance for Citizen Participation
Clean Water Action, Inc.
Colorado Association of Nonprofit Organizations
Community Anti-Drug Coalitions of America
The Conference Board
Cooperative for Assistance and Relief Everywhere, Inc. (CARE, Inc.)
Council for Advancement and Support of Education (CASE)
Council for Opportunity in Education
Easter Seals, Inc.
Girls Incorporated
HalfthePlanet Foundation
International Youth Foundation
Islamic Society of North America
KaBOOM! Inc.
Kidney Cancer Association
The Learning Center
The Leukemia and Lymphoma Society
Maryland Association of Nonprofit Organizations
National Asian Pacific American Legal Consortium
National Civic League (NCL)
National Committee to Preserve Social Security and Medicare
National FFA Foundation, Inc.
National Health Council
National Marfan Foundation
National Mental Health Association
National Multiple Sclerosis Society
National Puerto Rican Forum
National Urban League
National Wildlife Federation
NOW Legal Defense and Education Fund
Pennsylvania Association of Nonprofit Organizations
Points of Light Foundation
Public Education Network
South Carolina Association of Nonprofit Organizations
Theatre Communications Group
YMCA of the USA

QUESTION PRESENTED

Whether a State may prosecute, consistently with the First Amendment, an action for fraud against a professional fundraiser soliciting contributions on behalf of a charitable organization, where the fundraiser describes the charitable purposes for which the funds are being solicited, but does not disclose to prospective donors the fees and terms of the fundraiser's contract with the charity.

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BRIEF *AMICI CURIAE* ON BEHALF OF INDEPENDENT SECTOR AND OTHER NONPROFIT ORGANIZATIONS IN SUPPORT OF RESPONDENTS

Independent Sector submits this brief *amici curiae* in support of respondents on behalf of itself[1] and fifty-five other nonprofit organizations. The nonprofit organizations joining this brief are listed on the inside front cover, and their charitable purposes are described more fully in an appendix hereto. All parties have provided written consent to the filing of this brief. Letters of consent have been lodged with the Clerk.

INTEREST OF *AMICI CURIAE*

Independent Sector is a coalition of more than 700 national organizations and companies representing the vast diversity of the nonprofit sector and the field of philanthropy. Its members include many of the nation's most prominent nonprofit organizations, leading foundations, and Fortune 500 corporations with philanthropic giving programs. This network represents millions of volunteers, donors, and people served in communities around the world. Independent Sector members work globally and locally in human services, education, religion, the arts, research, youth development, health care, advocacy, the advancement of democracy, and many other areas.

It is part of Independent Sector's mission to ensure that the voices of nonprofit organizations are heard in important cases affecting them. Independent Sector, along with many of the other *amici,* has regularly participated as *amicus* before

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members or their counsel, made a monetary contribution to the preparation or submission of the brief. S. Ct. Rule 37.6.

this Court in cases of importance to the nonprofit sector, including cases addressing fundraising issues. *E.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997); *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988); *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985); *Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Regan v. Taxation with Representation*, 461 U.S. 540 (1983).

The other *amici* are charitable and educational organizations and associations. They rely on the general public for support, and fundraising from the public is therefore essential for their continued existence. At the same time, these organizations strive to educate the public about issues of importance to them, and educational materials are often distributed in conjunction with their fundraising appeals. To aid in their fundraising and public education efforts, many *amici* use professional fundraisers.

Amici have a special interest in preserving the good reputation of the charitable sector and protecting the donating public. For this reason, *amici* for many years have been strong advocates of fair and effective government regulation and of increasing the transparency of charities through greater disclosure of financial and programmatic information and enhanced public access to that information. At the urging of *amici* and others, the states and the federal government have already taken major steps to ensure greater public access to data about charities. The charitable sector itself has also stepped forward to increase access to information about charities and to provide better tools to help donors evaluate this information.

Despite these advances, unscrupulous fundraising practices unfortunately continue to exist. Such practices are

damaging both to the public and to the nonprofit community, and *amici* condemn them. *Amici* are submitting this brief not because they look with favor on the particular contractual arrangements at issue here, but because they share this Court's historic commitment to the First Amendment principle at stake. *Amici* are firmly convinced that increasing public access to information about charities, combined with vigorous enforcement of laws prohibiting fraud in a manner that does not chill the free speech of all charities, represents the best method of protecting both the public and the charitable sector.

SUMMARY OF ARGUMENT

Donors now have an unprecedented ability to judge which charities are worthy of their contributions. Charities and their fundraisers are required by law to make very extensive regulatory filings; there are increasing public and private efforts underway to make such filings and related information about charities readily available to the public, particularly on the Internet; and numerous tools to evaluate charities have been developed. These developments, combined with the ability of the states and the federal government to prosecute fraud based on affirmative misrepresentations and to revoke the charitable status of organizations that violate the law, provide sufficient means to protect the donating public from fraud without chilling charities' speech.

In this case, the Attorney General of Illinois has predicated a fraud prosecution solely on his retroactive judgment that a certain level of fundraising costs is "excessive" and that the nondisclosure of such costs to potential donors at the point of solicitation amounts to "misrepresentation." Allowing the Attorney General's lawsuit to proceed would have a profound chilling effect on protected speech because it would force charities and their fundraisers

to choose between two unacceptable options. Charities would be forced to keep their fundraising costs below whatever level the prosecuting authority in a given jurisdiction deems "excessive," a standard that will rarely be knowable in advance. Alternatively, charities would be forced to engage in "compelled speech"— to disclose their fundraising costs to each prospective donor in a manner that would seriously hamper the effectiveness of their appeals. Neither alternative is acceptable under the First Amendment. *See Riley v. National Fed'n of the Blind*, 487 U.S. 781, 789-90, 799-800 (1988); *Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 967-68 (1984); *Village of Schaumburg v. Citizens for a Better Envir't*, 444 U.S. 620, 636-37 (1980).

ARGUMENT

I. Increasing Public Access To Information About Charities, Coupled With Vigorous Enforcement Of Laws Prohibiting Affirmative Misrepresentations By Charities And Their Fundraisers, Represents The Most Effective And Least Intrusive Means Of Protecting The Public Against Fraud

In 1991, the Attorney General of Illinois filed this civil suit against respondents, for-profit professional fundraisers soliciting charitable contributions on behalf of an Illinois charity, VietNow National Headquarters ("VietNow"). The Attorney General's complaint did not allege affirmative misrepresentation. Rather, the suit relied on allegations that respondents committed fraud and breached their fiduciary duties by representing to potential donors the charitable purposes for which the donations were sought, without also disclosing the percentage of gross contributions that the fundraisers would be paid pursuant to their contracts with VietNow. According to the Attorney General, disclosure of fundraising fees in these circumstances is essential because

prospective donors allegedly "have significantly less access to such information." Pet. Br. 11, 36.

This Court made clear fifteen years ago, before the advent of the information age, that "fraud" may not be predicated on nondisclosure of fundraising fees. *See Riley*, 487 U.S. 781 (1988). Today, predicating fraud solely on nondisclosure of such fees is even less appropriate, because donors have the benefit of unprecedented access to information about charities. Through a combination of required disclosures to the government, public and private efforts to make such information widely available, and the proliferation of tools for evaluating charities, donors are better equipped than they ever have been to evaluate the worthiness of charities. These continuing efforts, strongly supported by *amici*, are already providing greater accountability and transparency for the charitable sector. Combined with the existing ability of the states and the federal government to prosecute fraud based on actual misrepresentations by fundraisers, these efforts represent the best and least intrusive way of protecting the public from questionable fundraising practices. The Illinois Attorney General's approach, by contrast, would compel speech and thus violate well-established First Amendment rights.

A. The States And The Federal Government Require Extensive Disclosure By Charities Of Their Activities And Finances

The legally required disclosures by charities are extensive. The IRS requires charities to file annually a six-page Form 990 (Return of Organization Exempt from Income Tax), a six-page "Schedule A" to Form 990 specifically

designed for charities, and a list of major donors.[2] As part of the Form 990, charities are required to provide detailed information about their fundraising costs. *See* Form 990, Part II (requiring a breakdown of fundraising costs and information about "joint costs" for combined educational and fundraising campaigns).[3]

Almost all of the states and many localities require charities and their professional fundraisers to register and file regular reports on their activities and finances, particularly their fundraising costs.[4] These jurisdictions generally require

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[2] A charity with annual gross receipts of less than $100,000 and end-of-year assets of less than $250,000 is permitted to file the two-page Form 990-EZ in place of the Form 990, but it is still required to file the six-page Schedule A and the list of major donors. *See* Instructions for Form 990 and Form 990-EZ (2001), at 1-2. Only charities with annual gross receipts that are normally $25,000 or less, and certain specific types of charities, primarily churches and church-related entities, are exempt from having to file either Form 990 or Form 990-EZ. *Id.* at 2.

[3] Charities are also required to make a one-time filing of Form 1023 (Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code) with the IRS to receive recognition of their tax-exempt charitable status. Only charities with annual gross receipts that are normally less than $5,000, churches and church-related entities are exempt from this requirement. *See* Instructions for Form 1023, at 1. This form also asks for information about fundraising activities. Form 1023, Part II, Question 3. The IRS has recently proposed modifying Form 1023 to require more information about fundraising activities, particularly if those activities involve professional fundraisers. *See* proposed Form 1023, Part VIII, Questions 3a, 3b, *available at* http://www.irs.gov/pub/irs-tege/draft_f1023.pdf (last visited January 17, 2003).

[4] Forty states and the District of Columbia require charities to register and file regular reports, although most states exempt certain categories of charities, such as churches, from this requirement. Forty-four states and the District of Columbia require professional fundraisers to register and file regular reports, again with some exemptions for professional fundraisers hired by certain categories of charities. *Survey of State Laws Regulating Charitable Solicitations*, The Philanthropy Monthly (2002).

charities to report information above and beyond the information provided to the IRS on Form 990, as well as requiring professional fundraisers to provide extensive information.

For example, in Illinois each charity that solicits contributions from persons in the state is required to file annually with the Attorney General a copy of its IRS Form 990, an Illinois Charitable Organization Annual Report (Form AG990-IL), an Individual Fundraising Campaign report (Form IFC) for each fundraising campaign in which the charity used a paid professional fundraiser, and audited financial statements if either the charity's gross contributions for the year exceeded $150,000 or it used a paid professional fundraiser that raised contributions in excess of $25,000. Ill. Admin. Code tit. 14, § 400.60 (2002); *see also* http://www.ag.state.il.us/charitable/require.htm (last visited January 17, 2003) (listing filing requirements).[5] Professional fundraisers are required to file every six months a financial report (Form PFR-02), a compensation report (Form PFR-04), an explanation of fundraising fees (Form PFR-05), and a Form IFC for each fundraising campaign conducted. Ill. Admin. Code tit. 14, § 400.65 (2002). They are also required to file annually a registration statement (Form PFR-01), a list of charities and contracts (Form PFR-06), a copy of each fundraising contract, and a bond. *Id.* § 400.70. The Illinois Attorney General in fact appears to have based his complaint in this case primarily on information contained in filings that respondents themselves made. *See* J.A. 21-35 (1984 and 1988 contracts between Telemarketing Associates and

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[5] Charities with annual contributions of $25,000 or less are subject to less onerous filing requirements, and religious charities can receive an exemption from these filing requirements. Ill. Admin. Code tit. 14, §§ 400.40(a), 400.60(e)(3) (2002).

VietNow), 41-82 (financial reports filed by Telemarketing Associates, Inc.), 90-100 (1992 contract between respondent Telemarketing Associates and VietNow).

Failure to file the required reports can lead to severe penalties. The IRS late-filing penalties accumulate at a rate of $20 per day, increased to $100 per day for charities with more than $1 million in annual gross receipts. 26 U.S.C. § 6652(c)(1)(A). The states can impose fines, require professional fundraisers to forfeit any compensation they have received, seek injunctive relief to prevent a charity or fundraiser that has not registered or filed the required reports from soliciting in the state, and even file criminal charges. *See, e.g.*, 225 Ill. Comp. Stat. 460/2(i) (civil penalties; injunctive relief), 460/6(g) & (h) (criminal penalties; forfeiture of compensation), 460/7(g) & (h) (late penalties; injunctive relief; forfeiture of compensation), 460/9(g) (punitive damages; injunctive relief), 460/9(h) (forfeiture of compensation) (West 1998).

B. Information Collected About Charities Is Readily Available To The Public

The information described above has been made available to the public both by governments and by private enterprises. All of the information reported to the IRS, except for the names, addresses and other identifying information for major donors, is available to the public from the IRS on request. 26 U.S.C. § 6104(a)(1), (b); 26 C.F.R. § 301.6104(b)-1. All charities are also required by law to provide copies of their Form 990 and schedules, except for information about major donors, to any person who requests a copy. 26 U.S.C. § 6104(d).[6]

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[6] Charities are also required to provide copies of Form 1023 to the public upon request. 26 U.S.C. § 6104(d)(1)(A)(ii). For more information about Form 1023, see *supra* note 3.

Philanthropic Research Inc. (PRI), itself a charity, has taken further steps to ensure that information about charities is readily available to the public. Funded by contributions from charitable private foundations and others interested in increasing the transparency of the charitable sector, and working with the IRS, PRI makes all Form 990s filed by charities available to the public at no charge through its web site, http://www.guidestar.org (last visited January 17, 2003). Searchable by name, key words, type of charity, income range, and location, the PRI database provides easy access to extensive information about every charity that files the Form 990.

Information filed with states is generally available on request from the appropriate agency, usually either the Attorney General or the Secretary of State. In Illinois, for example, any reports and documents filed with the Attorney General are open to public inspection. 225 Ill. Comp. Stat. 460/2(f) (West 1998). The Illinois Attorney General's office also provides for a nominal fee copies of reports it receives. *See* http://www.ag.state.il.us/charitable/aboutcharitydb.htm (last visited January 17, 2003) (stating that copies of reports are available for fifteen cents per page).

Many states have placed on the Internet, or are in the process of doing so, the reports they receive from charities and professional fundraisers. As noted by the Illinois Attorney General, a copy of VietNow's 2000 IRS Form 990 is available on the California Attorney General's web site, along with VietNow's audited financial statement for the same year. *See* Pet. 2 n.1. VietNow's Form 990 and audited financial statement clearly show the portion of contributions received that it spent on fundraising costs. *See* 2000 VietNow Form 990, Part I, line 15 & Part II, column (D); VietNow June 30, 2001 Financial Statement 3, 7. The Illinois Attorney

General is in the process of establishing an Internet-accessible database to provide the public with access to the reports it receives. *See* http://www.ag.state.il.us/charitable/charity.html (last visited January 17, 2003).

C. Potential Donors Have Numerous Tools, Provided By A Growing Number Of Sources, By Which They Can Evaluate Charities

The ready availability of information about charities has led to a proliferation of organizations rating and analyzing charities. The American Institute of Philanthropy publishes its ratings of more than 400 major charities, including VietNow, in its *Charity Rating Guide & Watchdog Report*, which is available by mail for $3.00; it also lists the top-rated charities at http://www.charitywatch.org (last visited January 17, 2003). Other organizations that evaluate charities include: the Better Business Bureau Wise Giving Alliance, which makes reports available at http://www.give.org (last visited January 17, 2003) on hundreds of charities, including VietNow, that solicit nationally or have national or international programs; Charity Navigator, which rates more than 1,700 charities at http://www.charitynavigator.org (last visited January 17, 2003); and Ministry Watch, which rates 485 large Christian charities at http://www.ministrywatch.org (last visited January 17, 2003). *See* Ian Wilhelm, *Charity Under Scrutiny*, The Chronicle of Philanthropy, Nov. 28, 2002, at 22 (reporting on the growth of charity watchdog services). In addition, state and local organizations, such as the Charities Review Council of Minnesota, also evaluate charities. *See, e.g.*, http://www.crcmn.org (last visited January 17, 2003).

Numerous membership organizations promulgate fundraising and other standards for specific types of charities. For example, the National Health Council promulgates

standards for voluntary health agencies, the Council on Accreditation for human services charities, the Land Trust Alliance for land trust charities, and the Evangelical Council for Financial Accountability for religious charities. To become members of these organizations, and receive the right to represent themselves to donors as members of these organizations, charities must satisfy their ethical standards.

Ratings of charities are also published on a regular basis by the media. For example, each December *Worth* magazine reports on the 100 best charities and a number of less-deserving charities. Reshma Memon Yaqub, *To Give Well, Give Wisely: The Worth 100*, Worth, Dec. 2002, at 80; Reshma Memon Yaqub, *Not Exactly Top 10*, Worth, Dec. 2002, at 95. Similarly, *Forbes* magazine reports annually on the largest charities, focusing in particular on their financial efficiency. *Good Works*, Forbes, Dec. 9, 2002, at 186 (annual survey of 200 major charities). *Smart Money* also annually ranks the nation's 100 largest charities by the percentage of budget dedicated to programs and the percentage spent on fundraising. *Make Your Donations Count*, Smart Money, Nov. 12, 2002, at 70. In addition, *The NonProfit Times* has been ranking charities for fourteen years, providing information on income and expenses drawn from IRS Form 990s. *Special Report NPT 100 – America's Largest Nonprofits*, The NonProfit Times, Nov. 1, 2002, at 30.

Many organizations also offer models and guides for evaluating charities. In addition to the organizations mentioned above that rate charities, organizations providing model standards include *amicus* Association of Fundraising Professionals (AFP) and *amicus* Independent Sector. For example, AFP distributes a Code of Ethics and a Donor Bill of Rights, and Independent Sector provides a compendium of standards and codes for nonprofit organizations at

http://www.independentsector.org/issues/accountability/standards.html (last visited January 17, 2003). All of these organizations have educational campaigns designed to increase public awareness of the available resources for learning more about charities. It is also common for the media to provide guidelines to help potential donors evaluate charities. *See, e.g.*, Sandra Block, *How to Give to Charities Without Receiving Solicitations*, USA Today, November 12, 2002, at B3 (offering suggestions on how to research a charity).

Government agencies also provide materials to help donors learn about and evaluate charities. For example, the Federal Trade Commission publishes a guide on telemarketing and charitable donations (*Charitable Donation$: Give or Take*), available at http://www.ftc.gov/bcp/conline/pubs/tmarkg/charity.htm (last visited January 17, 2003). Many state Attorneys General provide similar guides. For example, the California Attorney General publishes *Guide to Charitable Solicitation*, available at http://caag.state.ca.us/charities/publications/99char1.pdf (last visited January 17, 2003); the Illinois Attorney General publishes *Tips for Informed Charitable Giving*, available at http://www.ag.state.il.us/charitable/charitygive.htm (last visited January 17, 2003); and the New York Attorney General publishes *Tips on Charitable Giving*, available at http://www.oag.state.ny.us/charities/chargive.pdf (last visited January 17, 2003).

D. Steps Are Underway To Provide Even Greater Access To Information About Charities

The IRS and state charity regulators are working in collaboration with charities to enhance further the reporting of fundraising costs. For example, the IRS is considering expanding the amount of information that charities are required to report about fundraising costs on their Form 990s. *See* IRS Announcement 2002-87, 2002-39 I.R.B. 624 (noting recent changes to Form 990 to increase the accuracy of reported fundraising costs and seeking comments on other means to improve such reporting). *Amicus* Independent Sector plans to submit comments to the IRS in late January, 2003 in support of these efforts.

The accounting profession, working with the charitable sector, is also taking steps to improve the reporting of fundraising costs by charities. For example, in 1998 the American Institute of Certified Public Accountants issued a Statement of Position to govern how charities allocate costs for joint activities, such as mailings that have both a public education and a fundraising component. Known as "SOP 98-2" and entitled "Accounting for Costs of Materials and Activities of Not-for-Profit Organizations and State and Local Government Entities that Include Fundraising," this Statement is helping to standardize how fundraising costs are calculated and reported.

The IRS and a number of states, with strong support from the charitable sector, are also creating systems for electronic filing and even greater public dissemination of Form 990s and other charity filings. For example, twelve state charity offices are working with the Urban Institute's National Center for Charitable Statistics on a system for the electronic filing of Form 990 and state registration forms. Two of these

states, Pennsylvania and Colorado, already accept electronically-filed Form 990s and state charity forms. *See* http://nccs.urban.org (last visited January 17, 2003) (reporting on the status of this e-filing initiative). The Exempt Organizations Division of the IRS is working on an electronic filing process for the Form 990 at the federal level. *See* Exempt Organizations Division, Internal Revenue Service, *FY2003 Exempt Organizations (EO) Implementing Guidelines* (September 2002), at 4, 14-15 (listing electronic filing as one of the agency's "Key Strategic Initiatives").

Electronic filing is an important step in increasing public access to information about charities because it will shorten the time between the filing of returns and their public release. Electronically filed information is also much easier to process and to check for completeness and accuracy. The IRS and state regulators will therefore need to spend fewer resources on data processing and so will have more resources for audits and enforcement efforts.

In March 2002, leaders in the nonprofit community, including *amicus* Independent Sector, launched the Electronic Data Initiative for Nonprofits (EDIN), which seeks to promote an integrated federal and state effort to streamline the reporting and dissemination of data on nonprofit organizations through the appropriate use of electronic technology. The goal is to create a comprehensive, secure, integrated, and publicly accessible database about the operations of nonprofit organizations and to reduce the barriers to electronic filing of Form 990s. The coalition will educate nonprofit organizations about the benefits of electronic filing, collect feedback from charities and foundations, and share this information with the IRS and with Congress. The coalition will also attempt to secure support from tax preparation software vendors and the accounting and legal professions to help ensure successful and

rapid transition to electronic filing. As increasing numbers of nonprofit organizations transmit their data to the IRS and the states in electronic format, more accurate, timelier information about them will be available to potential donors.

Amicus Independent Sector has also launched a multi-tiered accountability initiative to help the boards and staffs of charities and other nonprofits develop clear standards and procedures for ethical behavior. The priority objectives of this initiative include enhancing accountability to the public and increasing openness about charitable activities and finances. Along with the other public and private efforts already mentioned, this initiative represents a highly effective way of ensuring that potential donors are fully informed about the activities and finances of charities.

E. The Government Retains The Ability To Prosecute Fraud Based On Affirmative Misrepresentations And To Revoke The Charitable Status Of Organizations That Violate The Law

The First Amendment does not prevent the states or the federal government from pursuing fraud claims against charities and their fundraisers based on affirmative misrepresentations to potential donors. In this respect, we agree with the Solicitor General that, if the Illinois Attorney General's amended complaint alleged that respondents intentionally made affirmative misrepresentations to potential donors about how much was to be paid to VietNow, such as telling donors that "90% or more goes to the vets" when this was not the case, then the amended complaint would state a cause of action for fraud that is permissible under the First Amendment. *See* U.S. Gov't Br. 4. The Supreme Court of Illinois appears to have foreclosed such a reading of the complaint, however, with its conclusion that, absent a

constitutionally impermissible attempt to impose a percentage-based limitation on fundraising costs, the complaint fails to state a cause of action under Illinois law for fraud or breach of fiduciary duty. Pet. App. 17; *see also id.* at 2 ("there is no allegation that [respondents] made affirmative misstatements to potential donors").

If a charity were found to have engaged in fraud based on such affirmative misrepresentations, or to have routinely failed to meet its legal obligations to make required filings with the IRS or state regulators, it could be subject to the loss of its tax-exempt status under both federal and state law. The IRS has ruled that a charitable organization may not engage in substantial unlawful activities because the conduct of an unlawful activity is inconsistent with charitable purposes. *E.g.*, Rev. Rul. 97-21, 1997-1 C.B. 121 (ruling that a charitable hospital convicted of violating the Medicare and Medicaid anti-kickback statute does not qualify as a tax-exempt charity); Rev. Rul. 75-284, 1975-2 C.B. 204 (ruling that an antiwar protest organization that urges demonstrators to commit violations of local ordinances and breaches of public order does not qualify as a tax-exempt charity). Illinois law provides that if an Illinois nonprofit corporation has solicited money and failed to use the money for the purpose for which it was solicited, or has fraudulently solicited money or fraudulently used the money solicited, the Circuit Court may, in an action by the Attorney General establishing these facts, dissolve that corporation. 805 Ill. Comp. Stat. 105/112.50(a)(4) (West 1993).

In certain circumstances, improper relationships between a charity and a professional fundraiser may also be cause for revocation of the charity's tax exemption. For example, in *United Cancer Council, Inc. v. Comm'r*, 165 F.3d 1173, 1179-80 (7th Cir. 1999), the Court of Appeals, while

rejecting IRS allegations of private inurement on the facts presented, recognized that if a charity were found to be operated to a significant degree for the private benefit of a fundraiser, the IRS could revoke the charity's tax-exempt status. Loss of federal tax-exempt charitable status would generally also result in loss of such status under state law. *E.g.*, 35 Ill. Comp. Stat. 5/205 (West 1996) (conditioning state tax exemption on federal tax exemption). If a fundraiser exercises substantial influence over a charity, the IRS can also impose financial penalties known as "intermediate sanctions" on the fundraiser and force it to repay any "excess benefits" it has improperly enjoyed at the charity's expense. *See* 26 U.S.C. § 4958 (imposing financial penalties on persons with substantial influence over a charity who engage in "excess benefit transactions" as defined by statute); 26 C.F.R. § 53.4958-3(e)(2) (providing that improper influence over a charity does not require formal or decisionmaking control, but includes practical dominance of a charity's affairs).

State and federal regulators thus have a large and growing arsenal of weapons that they may use to combat fraud by charities or their fundraisers. *Amici* strongly support the vigorous enforcement of these laws in ways that do not chill legitimate charitable speech.

II. It Is Inconsistent With The First Amendment To Predicate A Fraud Complaint Solely On Nondisclosure Of An Allegedly "Excessive" Fee Arrangement Between A Fundraiser And A Charity

Beginning in the long line of cases cited in *Village of Schaumburg v. Citizens for a Better Envir't*, 444 U.S. 620, 628-32 (1980), and continuing through *Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 961-62 (1984), and *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 789

(1988), into the more recent cases of *United States v. Kokinda*, 497 U.S. 720, 725 (1990), and *Internat'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 677-78 (1992), this Court has repeatedly reaffirmed that charitable solicitation speech is entitled to the highest degree of First Amendment protection because it is necessarily linked with informative and persuasive speech. As the Supreme Court of Illinois noted, this conclusion is particularly apposite here because "the fundraising services [respondents] provided * * * were inextricably intertwined with the advancement of VietNow's philosophy and purpose." Pet. App. 15. Government action infringing on such speech must therefore be narrowly tailored to serve a substantial governmental interest. *Riley*, 487 U.S. at 789; *Schaumburg*, 444 U.S. at 637.

Since speech requires a means to speak, this protection extends not only to speech in which charities engage directly, but also to speech of others who act on their behalf. *See, e.g., Meyer v. Grant*, 486 U.S. 414, 422-23 (1988) (holding that prohibiting proponents of a ballot initiative from hiring paid petition circulators to obtain the required signatures to place such an initiative on the ballot violates the First Amendment in part because it limits the number of voices that will convey the speaker's message). When a charity retains a professional fundraiser, therefore, First Amendment protection extends to solicitations that the fundraiser makes on behalf of the charity. *Riley*, 487 U.S. at 789; *Munson*, 467 U.S. at 960-61 & 967 n.16; *Schaumburg*, 444 U.S. at 635-36. Restrictions on how much a charity can pay a professional fundraiser, whether enacted by statute or imposed by individual fraud prosecutions, necessarily limit the ability of charities to speak, particularly charities that support unpopular causes or include significant educational or advocacy messages with their fundraising appeals. *Riley*, 487 U.S. at

794; *Munson*, 467 U.S. at 967; *Schaumburg*, 444 U.S. at 636-37.

Fundraising costs, whether incurred by a charity internally or paid to a professional fundraiser, vary widely depending on many factors, including factors outside the charity's control. *Riley*, 487 U.S. at 791-92; *Munson*, 467 U.S. at 961-62, 967; *Schaumburg*, 444 U.S. at 636-37 n.10. Charities seeking to raise funds for unpopular or novel causes almost inevitably incur high fundraising costs. Charities often use telemarketing communications, not only to raise funds, but also to acquaint the public with their charitable mission and to encourage citizen action. "Prospecting" solicitations, directed toward individuals with no prior giving history, are extremely expensive and time-consuming, and in the short run they usually generate an out-of-pocket loss. Therefore, basing fraud prosecutions solely on the existence of allegedly "high" fundraising costs, or requiring mandatory disclosure of such costs, threatens to chill the speech of the very charities that are in the greatest need of protection so that they may make their voices heard.

The government indisputably has a substantial interest in preventing fraud. This Court has repeatedly recognized, however, that the level of a charity's fundraising costs has little if any correlation with fraud. *Riley*, 487 U.S. at 793 & n.7; *Munson*, 467 U.S. at 966-67 & n.15; *Schaumburg*, 444 U.S. at 636-37. This Court has therefore struck down, as not narrowly tailored to serve this interest, statutes that conditioned a charity's right to speak on maintaining fundraising costs below a specified level. *Riley*, 487 U.S. at 798; *Munson*, 467 U.S. at 967-68; *Schaumburg*, 444 U.S. at 636-37.

There are many reasons why a charity could legitimately incur very substantial fundraising costs, either in a given fundraising campaign or over time. As noted in *Riley*:

> [T]here are several legitimate reasons why a charity might reject the State's overarching measure of a fundraising drive's legitimacy — the percentage of gross receipts remitted to the charity. For example, a charity might choose a particular type of fundraising drive, or a particular solicitor, expecting to receive a large sum as measured by total dollars rather than the percentage of dollars remitted. Or, a solicitation may be designed to sacrifice short-term gains in order to achieve long-term, collateral, or noncash benefits. To illustrate, a charity may choose to engage in the advocacy or dissemination of information during a solicitation, or may seek the introduction of the charity's officers to the philanthropic community during a special event (e.g., an awards dinner).

487 U.S. at 791-92. In *Munson*, Maryland officials had actually determined that the fundraising costs of thirteen charities (out of sixteen applicants) were reasonable even though they exceeded the statutory limit of 25%, including five charities with fundraising percentages of 80% to 85%. *Munson*, 467 U.S. at 967 n.15.

Better and less intrusive methods of combating fraud exist. The government may prohibit false statements and affirmative misrepresentations by solicitors; require truthful answers to questions about fundraising expenses; require extensive financial disclosures by charities and fundraisers; make this information readily accessible to the public in forms that permit efficient evaluation of individual charities; and prosecute charities and fundraisers that violate these

requirements. The federal government and the states also have the ability to investigate whether an organization with high fundraising costs is in fact a charity under the applicable laws, and to revoke the tax-exempt charitable status of an organization that engages in fraud or routinely fails to make its legally required filings.

This Court has specifically recognized that requiring charities to disclose their financial information to the government and then making that information available to the public is an available and constitutional means for addressing the fundraising concerns raised by the states. *Riley*, 487 U.S. at 795, 800; *Munson*, 467 U.S. at 967-68 n.16; *Schaumburg*, 444 U.S. at 637-68. As noted earlier, the amount of financial information collected about charities and the public's access to that information have increased dramatically since this Court's decision in *Riley*. These are exactly the methods for combating questionable fundraising practices that this Court has recognized as being consistent with the First Amendment.

III. The Illinois Attorney General's Fraud Suit Would Violate the First Amendment Because It Would Force Charities And Their Fundraisers Either To Keep Their Fundraising Costs Below Whatever Level The Attorney General Deems "Excessive" Or To Speak The Words Compelled By The Attorney General

This Court has flatly rejected any attempt by states to require charities to demonstrate that their fundraising expenses are "reasonable" in amount. *Riley*, 487 U.S. at 793 (rejecting as unconstitutional any requirement that a speaker prove "reasonableness" of fundraising fees "case by case based upon what is at best a loose inference that the fee might be too high"); *Munson*, 467 U.S. at 966 ("The flaw in the statute is not simply that it includes within its sweep some

impermissible applications, but that in *all* its applications it operates on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud.") (emphasis added). Such a requirement necessarily chills speech because "in every such case the fundraiser must bear the costs of litigation and the risk of a mistaken adverse finding by the factfinder, even if the fundraiser and the charity believe that the fee was in fact fair." *Riley*, 487 U.S. at 794; *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (noting that even if the facts exist to sustain the defense of truth for a speaker facing a libel suit by a public official, allowing such a suit to proceed absent actual malice on the part of the speaker impermissibly infringes on speech "because of doubt whether [the defense of truth] can be proved in court or fear of the expense of having to do so").

This Court has also rejected as unconstitutional any attempt by states to compel charities or their professional fundraisers to disclose their fundraising costs to potential donors, absent a question from those individuals about such costs. *Riley*, 487 U.S. at 795-801; *see also Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 573 (1995) (stating that outside of the commercial advertising context, the First Amendment gives speakers the right to tailor their speech, including the right to omit "statements of fact the speaker would rather avoid"). Yet that is exactly what the Illinois Attorney General is attempting to do in this case by making respondents' nondisclosure of their fee arrangement the basis for his claims of fraud and of other violations of state law. J.A. 10, 85-88.

Contrary to the Solicitor General's suggestion (U.S. Gov't Br. 9), the theory of the instant fraud complaint would inescapably impose on fundraisers an affirmative duty to disclose fundraising fees regarded by the government as

"excessive." The Solicitor General correctly recognizes that imposition of an absolute duty to disclose fundraising fees, whether by statutory prescription or by a common-law fraud action predicated on nondisclosure of such fees, would contradict this Court's holding in *Riley*. The Solicitor General accordingly argues that a duty to disclose is not absolute under the Illinois Attorney General's theory, but would arise only where disclosure of fundraising fees is necessary to ensure that other representations made by the fundraiser are not misleading. *See* U.S. Gov't Br. 9, 24-25.

In the eyes of an aggressive attorney general, however, virtually any statement that a fundraiser would make in a real-world solicitation could be said to be "potentially misleading" if not accompanied by disclosure of his fees. For example, the mere statement that funds received "would go to Charity X," or that "Charity X would benefit from the contribution," could be said to be misleading unless the fundraiser also explained that the fees it received would diminish the charity's net receipts. Indeed, the allegedly "misleading" statement by the fundraiser here was a straightforward recitation of VietNow's charitable purposes; it is hard to imagine any fundraising solicitation that would not identify the charity's tax-exempt mission. Thus, if this Court allows the Attorney General's complaint to proceed, the only practical way for a charity or its professional fundraiser to be assured that the agreed-upon payments to the fundraiser will not expose the fundraiser to a claim of fraud would be for the fundraiser to disclose his fees. This Court has recognized that being forced to make such disclosures would seriously hamper the legitimate efforts of fundraisers to raise money for the charities they represent, in violation of the First Amendment. *Riley*, 487 U.S. at 799-800.

Illinois here has attempted to impose a fee-disclosure requirement on fundraisers, not by statute as in *Riley*, but through the *in terrorem* effects of an individualized fraud complaint. But all of the reasons for rejecting such attempts when made through statutes or regulations apply with equal force to attempts made through individual prosecutions. This is particularly true here, because the Attorney General is not only seeking various monetary penalties if fraud is shown but also seeking to enjoin respondents from speaking in the State of Illinois in the future. J.A. 12-13, 88. The Attorney General is therefore attempting to impose a prior restraint of speech on respondents that for respondents is as broad and debilitating as any statute or regulation. As this Court noted in *Munson*, it makes little difference whether a charity or professional fundraiser is subject to a pre-donation regulation or to a post-donation prosecution based on fundraising costs, since the adverse effect on protected speech is the same. *Munson*, 467 U.S. at 969.

The governmental action here is actually more flawed constitutionally than the statutes invalidated in *Schaumburg*, *Munson*, and *Riley*, because those statutes at least provided clear guidance regarding what level of fundraising costs would be permitted. Respondents here face prosecution based solely on the Illinois Attorney General's after-the-fact judgments that the level of their fundraising costs is "excessive" and, therefore, that nondisclosure of such costs converts into a "misrepresentation" an otherwise accurate description of VietNow's charitable purposes. But a charity would have no way of knowing, in advance, what types of fundraising arrangements prosecutors would later regard as "excessive," or even what factors would enter into such a determination. Nor could a charity predict in advance how prosecutors would later parse particular statements made during the fundraising solicitation, which might be deemed

"misleading," or not, depending on subtle variations in language. Thus, if the Attorney General's complaint were allowed to proceed, any prosecutor would have it in his discretion to pursue claims of fraud against whatever charities he chose, based on highly subjective, after-the-fact determinations.

For example, the Attorney General of Maryland, under this approach, could seek to impose the same 25% limit on fundraising costs rejected in *Munson* by bringing or threatening to bring fraud claims against any charity that paid a professional fundraiser more than that amount, unless the fundraiser disclosed the fee arrangement to potential donors. Such discretionary power would create "a threat of censorship that by its very existence chills free speech." *Munson*, 467 U.S. at 964 n.12. This threat is particularly acute for charities that engage in advocacy or support unpopular causes — charities that are likely to have high fundraising costs and, concurrently, to engage in speech that governmental officials may be especially desirous of silencing. *See Riley*, 487 U.S. at 794 (expressing concern that uncertainty about what fundraising costs are in fact "reasonable" would discourage professional fundraisers from engaging in "solicitations combined with the advocacy and dissemination of information" or fundraising for "primarily small or unpopular" charities); *Munson*, 467 U.S. at 967 ("It is equally likely that the statute [based on fundraising costs] will restrict First Amendment activity that results in high costs but is itself a part of the charity's goal or that is simply attributable to the fact that the charity's cause proves to be unpopular.").

Charities and their fundraisers would also face a proliferation of varying standards regarding what level of fundraising costs are "excessive," how the determination of

"excessive costs" is made, what other statements by a fundraiser might thereby be rendered "misleading," and what evidence is required to counter such allegations. The proliferation of diverse and vague standards, combined with substantial prosecutorial discretion, would have a strong chilling effect on the speech of charities that solicit contributions in more than one jurisdiction. This chilling effect would be compounded by the prospect of rulings on such claims being issued by juries in multiple jurisdictions, potentially accompanied by large and unpredictable compensatory and punitive damage verdicts, and imposing high litigation costs even on charities and fundraisers that successfully defend themselves. The inevitable consequence would be a *de facto* requirement that charities disclose their fundraising expenses, which would enable the government to impose indirectly the very obligation that this Court, in *Riley*, held that the government may not impose directly.

The federal government and the states have an array of constitutionally permissible options for addressing their legitimate interests in combating fraud and in ensuring that organizations making charitable fundraising appeals are legitimate charities and not fronts for for-profit entities. The government's ability to require extensive disclosure of financial information by charities and their fundraisers and to make that information readily available to the public is one such option.[7] The government can also require fundraisers to answer truthfully questions posed by prospective donors about fundraising costs, as Illinois in fact does. *See Riley*, 487 U.S. at 799 (noting that an unchallenged portion of the North

[7] The Illinois Attorney General was in fact allowed to proceed with his claim that respondent Armet, Inc. had failed to comply with the Illinois registration requirements for professional fundraisers, but chose to dismiss that claim in order to appeal immediately the dismissal of the rest of his claims. Pet. App. 22.

Carolina statute at issue required disclosure to donors of a fundraiser's professional status, and another statute required fundraisers to disclose upon request how much of the contributions would be turned over to the charity); 225 Ill. Comp. Stat. 460/17(b) (West 1998) (requiring a professional fundraiser that receives a certain percentage of the gross amount of each contribution to disclose that percentage amount if the potential donor asks for this information). The federal government requires professional fundraisers that raise funds through telephone calls to promptly identify the charity on behalf of which they are calling, to state they are calling to solicit a contribution, and to agree to remove a person's name from their calling list on request. 16 C.F.R. § 310.4(b)(1)(iii), (e). Illinois law has a similar requirement that paid professional fundraisers promptly identify themselves as such, and inform the potential donor that contracts and reports regarding the charity are on file with the Attorney General. 225 Ill. Comp. Stat. 460/17(a) (West 1998).

As noted above, the states and the federal government also have the ability to pursue fraud prosecutions based on false statements and affirmative misrepresentations, and to revoke the tax-exempt status of charities that engage in fraud or violate laws governing charitable solicitations. *Amici* strongly support vigorous enforcement of these laws. Furthermore, if the states or the federal government are concerned that an organization is not a legitimate charity because it is providing an improper benefit to its professional fundraisers, the best way to address that concern is not to rely on the vague standard of materiality found in a common-law fraud claim, but to seek instead to revoke the tax-exempt charitable status of the offending organization itself. *See United Cancer Council, Inc. v. Comm'r*, 165 F.3d 1173, 1179-80 (7th Cir. 1999).

In short, the government has more than sufficient methods for addressing questionable fundraising practices, and those methods are becoming more and more effective every day. The explosive growth of information about charities available through the Internet and from government agencies in particular has increased the transparency of the charitable sector and provided the public with enormous amounts of information to guide their giving decisions. There is therefore no need or constitutional justification for allowing the Illinois Attorney General's claim of fraud based on the level and nondisclosure of fundraising costs to proceed, with all of the negative ramifications on the speech of charities and their professional fundraisers that would ensue.

CONCLUSION

The judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted,

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APPENDIX

Charitable Purposes Of Amici Other Than Independent Sector

Advocacy Institute
The Advocacy Institute works to make social justice leadership strategic, effective, and sustainable in the pursuit of a just world.

Alliance for Children and Families
The mission of the Alliance for Children and Families is to strengthen the capacities of North America's child and family nonprofit service organizations and to advocate for children, families, and communities.

Alliance of Nonprofit Mailers
The Alliance of Nonprofit Mailers is a national coalition of nonprofit organizations interested in nonprofit postal policy that use the mail to raise funds, solicit members, and disseminate information.

American Association of Museums
The mission of the American Association of Museums (AAM) is to represent the museum community, address its needs, and enhance its ability to serve the public.

American Autoimmune Related Diseases Association (AARDA)
AARDA works to bring a national focus and collaborative effort to more than 80 autoimmune diseases and relieve their socioeconomic impact through education, awareness, and research support.

American Cancer Society
The American Cancer Society is the nationwide community-based voluntary health organization dedicated to eliminating cancer as a major health problem by preventing cancer, saving lives, and diminishing suffering from cancer through research, education, advocacy, and service.

American Diabetes Association
The American Diabetes Association is the nation's leading nonprofit health organization providing diabetes research, information and advocacy. The mission of the organization is to prevent and cure diabetes and to improve the lives of all people affected by diabetes.

American Foundation for AIDS Research (amfAR)
The American Foundation for AIDS Research (amfAR) is the nation's leading nonprofit organization dedicated to the support of HIV/AIDS research, AIDS prevention, treatment education, and the advocacy of sound AIDS-related public policy.

American Foundation for the Blind
The American Foundation for the Blind is a national charitable nonprofit whose mission is to eliminate the inequities faced by the ten million Americans who are blind or visually impaired through the critical issues of literacy, independent living, employment, and access through technology.

American Heart Association
The American Heart Association is a national voluntary health agency whose mission is to reduce disability and death from cardiovascular diseases and stroke.

American Lung Association
The American Lung Association is a national voluntary health agency whose mission is to prevent lung disease and promote lung health.

American Society of Association Executives
The mission of the American Society of Association Executives is to advance the value of associations to society and to support the professionalism of the individuals who lead them.

American Symphony Orchestra League
The American Symphony Orchestra League provides leadership and service to American orchestras while communicating to the public the value and importance of orchestras and the music they perform.

Americans for the Arts
Americans for the Arts is the nation's leading nonprofit organization for advancing the arts in America. It is dedicated to representing and serving local communities and creating opportunities for every American to participate in and appreciate all forms of art.

ANGELCARE
ANGELCARE's mission is to offer an opportunity for a partnership with caring people who become members of their "band of angels" to answer prayers of the world's children for food, clothing, schooling, and disaster relief.

The ASPIRA Association, Inc.
Established in 1961, the ASPIRA Association, Inc., is a national nonprofit organization whose primary mission is to

foster the socioeconomic development of the Latino community.

Association of Fundraising Professionals (AFP)
AFP, an association of professionals throughout the world, advances philanthropy by enabling people and organizations to practice effective and ethical fundraising.

The Catholic Charities of Santa Clara County, California
Catholic Charities strives to empower the working poor to move beyond basic survival living to a state of meaningful, quality living through economic, family, and emotional stability.

Center on Philanthropy
The mission of the Center on Philanthropy is to increase the understanding of philanthropy and improve its practice.

CIVICUS: World Alliance for Citizen Participation
CIVICUS is an international alliance dedicated to strengthening citizen action and civil society throughout the world.

Clean Water Action, Inc.
Clean Water Action is a nonprofit citizen's environmental organization with goals of clean, safe, and affordable water, prevention of health-threatening pollution, creation of environmentally safe jobs and businesses, and empowerment of people to make democracy work.

Colorado Association of Nonprofit Organizations
The mission of the Colorado Association of Nonprofit Organizations is to lead, serve, and strengthen Colorado's nonprofit organizations.

Community Anti-Drug Coalitions of America
CADCA's mission is to build and strengthen the capacity of community coalitions to create safe, healthy, and drug-free communities.

The Conference Board
The Conference Board is a global independent public-purpose membership organization that conducts research, brings executives together to learn from one another, convenes conferences, publishes information, and forecasts and assesses trends.

Cooperative for Assistance and Relief Everywhere, Inc. (CARE, Inc.)
The mission of CARE, Inc. is to provide international humanitarian relief and development in over 40 developing countries around the world.

Council for Advancement and Support of Education (CASE)
CASE is the leading resource for professional development, information, and standards in the fields of education fundraising, communications, and alumni relations.

Council for Opportunity in Education
The mission of the Council is to advance and defend the ideal of equal educational opportunity in postsecondary education. As such, the focus of the Council is assuring that the least advantaged segments of the American population have a realistic chance to enter and graduate from a postsecondary institution.

Easter Seals, Inc.
The mission of Easter Seals is to create solutions that change the lives of children and adults with disabilities or other special needs and their families.

Girls Incorporated
Girls Incorporated is a national nonprofit that inspires all girls to be strong, smart, and bold. Since 1945, Girls Incorporated has offered public education and programs that empower girls to understand and assert their rights.

HalfthePlanet Foundation
HalfthePlanet Foundation is a nonprofit organization that supports the application of technology to promote the values of the Americans with Disabilities Act (ADA)—independent living, social inclusion, equality of opportunity, economic self-sufficiency, and empowerment.

International Youth Foundation
The mission of the International Youth Foundation is to positively impact the greatest number of young people, in as many places as possible, in the shortest amount of time, with programs that are effective, and in ways that are sustainable.

Islamic Society of North America
The mission of the Islamic Society of North America is to provide a platform of expression for Islam, to develop educational outreach and social services that translate the teachings of Islam into everyday living, and to enhance Islamic identity in society.

KaBOOM! Inc.
It is KaBOOM!'s mission that every child, through the participation of their communities, should have healthy play opportunities. KaBOOM! leads safe and accessible community-building playground projects that are critical to the development of children.

Kidney Cancer Association
The Kidney Cancer Association is a membership organization made up of patients, family members, physicians, researchers, and other health professionals. Its mission is a world without kidney cancer.

The Learning Center
The Learning Center provides prevention and early intervention services for children from birth through 5 years of age and works in collaboration with both families and the community.

The Leukemia and Lymphoma Society
The Leukemia and Lymphoma Society is the world's largest voluntary health organization dedicated to funding blood cancer research, education and patient services. The Society's mission is to cure leukemia, lymphoma, Hodgkin's disease and myeloma, and to improve the quality of life of patients and their families.

Maryland Association of Nonprofit Organizations
The Maryland Association of Nonprofit Organizations works to strengthen and support the ability of nonprofit organizations to serve the community, and to enhance public understanding of, confidence in, and support for the nonprofit sector.

National Asian Pacific American Legal Consortium
The National Asian Pacific American Legal Consortium is a national nonprofit, nonpartisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans.

National Civic League (NCL)
The National Civic League (NCL) is a 107-year-old nonprofit, nonpartisan organization dedicated to strengthening citizen democracy by transforming democratic institutions. NCL accomplishes its mission through technical assistance, training, publishing, research, and the All-America City Awards, the nation's oldest and most prestigious community recognition program.

National Committee to Preserve Social Security and Medicare
The mission of the National Committee to Preserve Social Security and Medicare, a membership organization, is to protect, preserve, promote, and ensure the financial security, health, and well being of current and future generations of maturing Americans.

National FFA Foundation, Inc.
The National FFA Foundation, Inc., provides financial support for Future Farmers of America (FFA) programs. FFA makes a positive difference in the lives of students by developing their potential for premier leadership, personal growth, and career success through agriculture education.

National Health Council
The National Health Council advances patient care, medical research, health education, and community services nationwide through voluntary health agencies that serve people with chronic diseases and/or disabilities.

National Marfan Foundation
National Marfan Foundation is a volunteer health organization dedicated to saving lives and improving the quality of life for individuals affected by Marfan syndrome by providing education, awareness, research and support.

National Mental Health Association
The National Mental Health Association is dedicated to promoting mental health, preventing mental disorders, and achieving victory over mental illness through advocacy, education, research, and service.

National Multiple Sclerosis Society
The mission of the National Multiple Sclerosis Society is to end the devastating effects of MS. The Society and its network of chapters nationwide promote research, educate, advocate on critical issues, and organize a wide range of programs—including support for the newly diagnosed and those living with MS over time.

National Puerto Rican Forum
The National Puerto Rican Forum is a leadership organization working to enhance the socio-economic conditions of the Latino population and other underserved communities through information, advocacy, and direct services.

National Urban League
The mission of the Urban League movement is to enable African Americans to secure economic self-reliance, parity and power, and civil rights.

National Wildlife Federation
The mission of the National Wildlife Federation is to educate, inspire and assist individuals and organizations of diverse cultures to conserve wildlife and other natural resources and to protect the Earth's environment in order to achieve a peaceful, equitable and sustainable future.

NOW Legal Defense and Education Fund
NOW Legal Defense and Education Fund is a leading national nonprofit civil rights organization that for more than thirty years has used the power of the law to define and defend women's rights.

Pennsylvania Association of Nonprofit Organizations
PANO is the statewide membership organization serving and advancing the charitable nonprofit sector through leadership, advocacy, education, and services in order to improve the quality of life in Pennsylvania.

Points of Light Foundation
The mission of the Points of Light Foundation is to engage more people more effectively in volunteer service to help solve serious social problems.

Public Education Network
The mission of the Public Education Network is to build public demand and mobilize resources for quality public education for all children through a national constituency of local education funds and individuals.

South Carolina Association of Nonprofit Organizations
The mission of the South Carolina Association of Nonprofit Organizations is to improve charitable services to the citizens of South Carolina by strengthening the leadership and management capacities of nonprofit organizations. This is accomplished through advocacy, cost-saving programs, networking, information, resources, education, and training.

Theatre Communications Group
The Theatre Communications Group's mission is to strengthen, nurture, and promote the professional not-for-profit American theatre.

YMCA of the USA
The mission of the YMCA of the USA is to put Christian principles into practice through programs that build healthy spirit, mind, and body.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, ATTORNEY GENERAL OF THE STATE OF ILLINOIS,

Petitioner,

v.

TELEMARKETING ASSOCIATES, INC., RICHARD TROIA AND ARMET, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF THE AMERICAN TELESERVICES ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

No. 01-1806

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN,
ATTORNEY GENERAL OF THE STATE OF ILLINOIS,
Petitioner,

v.

TELEMARKETING ASSOCIATES, INC.,
RICHARD TROIA AND ARMET, INC.,
Respondents.

**On Writ of Certiorari to the
Supreme Court of Illinois**

BRIEF OF THE AMERICAN TELESERVICES ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE[1]

The American Teleservices Association ("ATA"), founded in 1983, is the not-for-profit trade association of the teleservices industry representing the interests of teleservice

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[1] In accordance with Rule 37.6 of the Court, counsel represents that no part of this brief was authored by counsel for a party, and no person or entity other than ATA and its members made any monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

providers and users in the United States. ATA has more than 2,500 members, which include telemarketing service agencies, consultants, customer service trainers, and other service providers. ATA's members also include users of teleservices, including advertisers, retailers, catalogers, manufacturers, financial service providers, and non-profit organizations.

ATA represents the interests of its members in the lawmaking arena and educates its members, policymakers and the general public on the legal, ethical and professional deployment of teleservices. Not only must ATA members comply with existing federal and state laws governing telemarketing, they also adhere to a strict ethical code governing their practices. The application for membership in ATA requires applicants to sign a statement that they have read and will comply with the ATA Code of Ethics ("ATA Code"). The ATA Code demands that telemarketers keep apprised of and comply with all applicable laws – federal, state, local – and their implementing regulations. It requires that, prior to placing a single call, a telemarketer must receive adequate training in professional telemarketing, recognized procedures and proper etiquette. The ATA Code further requires all solicitations to be stated clearly and honestly, so both parties know the precise terms of the transaction. The Code prohibits unprofessional and dishonest claims which are untrue, misleading, deceptive, fraudulent or unjustly disparaging of competitors.

This case is of particular interest to ATA and its members because the State of Illinois is seeking to undermine existing precedent and to impose special legal obligations and diminished constitutional protection on professional telemarketers that assist with charitable solicitations. Although this Court has held that for-profit solicitors are

fully protected by the First Amendment and that the government cannot use the percentage of proceeds spent on administration as the test for fraud, the state is seeking to reduce the level of constitutional scrutiny and to allow just such a percentage-based presumption.

Significantly, the effort to roll back this Court's holdings on solicitation is not confined to the State of Illinois. A majority of the states support Illinois' argument to subvert established law, as does the federal government.[2] Most notably, the federal amici are asking this Court to adopt a new constitutional standard to bless federal rules that subject for-profit telemarketers to more burdensome regulations than apply to their non-profit counterparts. *See* Fed. Br. at 2. The new rules, announced December 18, 2002 but not yet in effect, modify FTC rules governing telemarketing. Among other things, the rules – which apply to for-profit telemarketers but not the charities they represent – prohibit misrepresenting "directly or by implication" the "purpose for which any charitable contribution will be used" or the "percentage or amount of any charitable contribution that will go to a charitable organization or to any particular charitable program."[3] Ultimately, the supporting amici, like the petitioner, are asking this Court to adopt a new constitutional rule that accords professional solicitors a lower level of First

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[2] *See generally* Br. of the States of Florida, et al., ("State Br."); Br. for the United States and the Federal Trade Commission ("Fed. Br.").

[3] 16 C.F.R. § 310.3(d)(3). Federal amici's quotations of the rules are inaccurate, perhaps because they relied on a proposed version of the new rules, and not the regulations as ultimately announced by the FTC. *Compare id.* with Fed. Br. at 2. The new rules were released by the FTC on December 18, 2002 but have not yet been published in the Federal Register.

Amendment protection and effectively compels the disclosure of the percentage of receipts devoted to charitable programs.

The interest of amicus ATA is the same as that of the petitioner and its supporting amici – to ensure honest solicitations through telemarketing practices that conform to the highest professional standards. But, unlike petitioner and its supporters, ATA believes it is vitally important that this Court "keep[] the starch in the standards" in applying First Amendment protections to telemarketing activities. *See Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 774 (1996) (Souter, J., concurring). Any other answer would allow governments at all levels to use their unbounded discretion to restrict speech that traditionally has been protected by this Court.[4]

STATEMENT

This case does not involve allegations that a professional fundraiser "made affirmative misstatements to potential donors." *Ryan v. Telemarketing Assoc., Inc.*, 198 Ill.2d 345, 348 (Ill. 2001). Rather, the Illinois Attorney General based his charges on the fact that respondent Telemarketing Associates "retained 85% of charitable funds collected on behalf of a charity * * * and, when soliciting, failed to inform donors that only 15% of their contribution would be distributed to the charity." *Id.* at 347. According to the complaint, the arrangement constituted common law fraud and violated Illinois law governing charitable solicitations

[4]It is not ATA's intention here to endorse the specific contracts between Telemarketing Associates and VietNow. Rather, it is to reaffirm the well-established principle that the government may not presume fraud based on the fee arrangement between a charity and a professional fundraiser.

because "the fees charged by defendants for conducting solicitation were 'excessive in amount and an unreasonable use and waste of charitable assets,' and because defendants did not advise donors that only 15% of the funds raised would be turned over to VietNow." *Id.* at 349. Given the amount of the fee, Illinois claimed that the failure to disclose the arrangement rendered the solicitation "knowingly deceptive and materially false." *Id.* The Attorney General alleged that the arrangement amounted to "constructive fraud" on the theory that "retention of 85% of donated funds goes well beyond any reasonable expectation of the public." *Id.* at 351-352.

Throughout the proceedings below, there has never been an allegation that Telemarketing Associates failed to honestly and faithfully carry out the terms of its contract. *Id.* at 348. Nor has there ever been a suggestion that respondents failed to turn over the funds it collected for charitable purposes pursuant to the agreement.[5] In addition to collecting funds, the contract required Telemarketing Associates to "promote goodwill" for the charity, "enhance good public relations through [its] sales techniques, and "increas[e] public awareness and financial support for the organization." Under the terms of the agreement, respondent was required to publish annually an advertiser-supported magazine to distribute VietNow's message. Pet. Br. 4. The Illinois Supreme Court found that Telemarketing Associates did what it was hired to do, and that VietNow was satisfied with the fundraiser's performance. *Telemarketing Assoc.*, 198 Ill. 2d at 348.

[5]Petitioner acknowledges that respondents provided over $1 million in donations to VietNow, and that this was the amount specified in the fundraising contracts. Pet. Br. 2, 3. *See Telemarketing Assoc.*, 198 Ill. 2d at 348.

Against this background, the circuit court, court of appeals, and Supreme Court of Illinois all held that the state's allegations of fraud against Telemarketing Associates are barred by the First Amendment pursuant to this Court's holdings in *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), *Secretary of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947 (1984) and *Village of Schaumburg v. Citizens For A Better Env't*, 444 U.S. 620, 636-637 (1980).

SUMMARY OF ARGUMENT

The question presented in this case is not, as petitioner has framed it, whether "misrepresentations" of fact are protected by the First Amendment. Rather, it is whether there are limits to the government's ability to label speech as "fraudulent" in an attempt to divest a speaker of constitutional protection. Here, the state claims that respondent's speech is unprotected because it is "deceptive," but reaches this conclusion only by assuming the truth of its allegations and by labeling the result "constructive fraud." Cutting through petitioner's rhetoric, the state's argument rests on the assumption that a for-profit fundraiser's failure to disclose high fundraising costs is inherently deceptive.

A fatal problem with respondent's position is that it flies in the face of well-established precedent of this Court and of the lower courts. In a body of case law that extends to the 1930s, this Court has applied First Amendment protection to various forms of solicitation, and in recent years has specifically held that professional fundraisers receive full constitutional protection. In particular, this Court's precedents make clear that the government cannot regulate the amount of charitable proceeds that can be devoted to fundraising expenses and that solicitors cannot be compelled to disclose the amount of their

expenses. Any such requirements necessarily restrict First Amendment activity.

From the beginning of this case, the State of Illinois has focused almost exclusively on the amount of the fee retained by Telemarketing Associates. Because of the amount of its compensation (measured as a percentage of total contributions), the state alleged that Telemarketing Associates engaged in "implied misrepresentation" to the extent it failed to disclose its fee to potential donors. In short, petitioner is seeking to impose a Hobson's choice on professional fundraisers. Those with fees that are "too high" by some undefined standard acquire an obligation to disclose the proportion of proceeds devoted to fundraising, or else they face allegations of fraud.

This Court has held that the First Amendment prohibits direct regulation of professional fundraising to achieve such an objective. For the same reasons, the Constitution bars state and local governments from imposing the same restrictions on speech indirectly, through the threat of fraud prosecutions. This Court has been quite clear in its holdings that there is no relationship between high solicitation expenses and state concerns about preventing fraud. Many factors explain the cost of charitable solicitations, including the size and popularity of the cause, the need to use professional solicitors, and the desire to achieve educational and other long-range objectives. Additionally, the cases hold any legal requirement that compels a charity to disclose its fundraising expenses would violate the First Amendment. Among other reasons, such a mandate discriminates between charities that use volunteers and those that use professional solicitors.

These well established constitutional principles apply fully to petitioner's attempt to target solicitors using a case-by-case approach. It is not the form in which state action is applied that leads to the constitutional violation; it is the attempt to create a substantive rule that is in conflict with established law. In this instance, the state is seeking to use its prosecutorial power to undermine the rules regarding charitable solicitations. In addition, petitioner is seeking to reduce the level of constitutional protection accorded to professional solicitors as compared to their non-profit counterparts. Its argument plainly contradicts the bedrock rule that a speaker does not lose constitutional immunity because he or she was paid to speak.

At base, petitioner is asking this Court to approve a standard that would give it unbounded discretion to prosecute disfavored charities for fraud any time the attorney general believes its solicitation expenses are "too high." Rather than attempting to specify what solicitation fee is "reasonable," the state seeks authority to prosecute based on "what the public reasonably understands" about the sufficiency of the fee. The state asserts that an implied misrepresentation could be predicated on "almost infinite variations of human language," thus creating for itself virtually unbounded discretion to prosecute disfavored causes. Such a standard will weigh most heavily on unpopular charities that historically have had higher solicitation fees. Such a standard would significantly chill protected speech by creating a *de facto* disclosure requirement for any solicitor whose fees risk being considered "too high" by the state.

ARGUMENT

I. ILLINOIS IS SEEKING TO EVADE WELL-ESTABLISHED FIRST AMENDMENT LIMITS ON STATE REGULATION OF SOLICITATIONS

The State of Illinois prosecuted Telemarketing Associates under the Illinois Solicitation for Charity Act and the Uniform Deceptive Trade Practices Act in essence because the respondent did not affirmatively disclose to prospective donors the percentage of contributions devoted to administration and fundraising costs. In short, petitioner is asking this Court to rule that the government constitutionally may impose a legal requirement that (1) a professional fundraiser's fee cannot be "too high," and (2) failure to affirmatively disclose the amount of the fee to potential donors constitutes "constructive fraud."

While the state appears to admit that either of these rules is plainly unconstitutional if imposed directly by ordinance or state law, Pet. Br. at 41, it maintains that essentially the same standards may be applied case-by-case through individual prosecutions. However, if this Court accepts petitioner's argument, the effect would be to approve a semantic distinction that would undo decades of First Amendment jurisprudence governing solicitations.[6]

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[6]The state amici quite candidly ask this Court to reconsider its holding in *Riley*, State Br. 13, thus revealing the incompatibility between their position and established law.

A. Courts Consistently Have Blocked Efforts By State and Local Governments to Restrict Solicitation Campaigns

As long as there have been residential solicitations, whether charitable or otherwise, the government has sought to regulate them.[7] However, beginning in the 1930s, when this Court was first developing its First Amendment jurisprudence, and continuing into the 1980s, after constitutional immunity was extended to commercial speakers, this Court consistently has issued decisions protecting speech "even though it is in the form of * * * a solicitation to pay or contribute money." *Bates v. State Bar of Arizona*, 433 U.S. 350, 363 (1977), citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In doing so, this Court forged two strong principles: (1) the government cannot regulate the amount of charitable proceeds that can be spent on professional fundraising efforts, and (2) the law cannot require solicitors to disclose the percentage of their proceeds expended on fundraising. *Riley*, 487 U.S. at 789-794, 797-798; *Munson*, 467 U.S. at 961, 965-70; *Schaumburg*, 444 U.S. at 636-637.

Strong reasons support these rules. As explained in *Schaumburg*, 444 U.S. at 632, charitable appeals are "characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views." Indeed, as is the case here, the typical

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[7] *See, e.g., Schneider v. State*, 308 U.S. 147 (1939); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Jamison v. Texas*, 318 U.S. 413 (1943); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Thomas v. Collins*, 323 U.S. 516 (1945); *Breard v. Alexandria*, 341 U.S. 622 (1951); *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976).

contract calls for more than simply collecting and delivering proceeds for a particular cause. Such arrangements entail formulating and delivering the charity's message, increasing public awareness of important issues, and promoting good will. *See Riley*, 487 U.S. at 792 ("a solicitation may be designed to sacrifice short-term gains in order to achieve long-term, collateral, or noncash benefits"). Consequently, it is bedrock law that "a percentage limitation on fundraising *necessarily* restricts protected First Amendment activity." *Munson*, 467 U.S. at 965 n.13 (emphasis added); *see id* at 967 n.16 ("the percentage limitation is a direct restriction on the amount of money a charity can spend on fundraising activity").

Petitioner's denial of any intent to impose a percentage limit on solicitation expenses and the claim that its only purpose is to combat "fraud" is belied by the history of this case and the state's singular fixation on the amount of respondent's fee. The complaint below focused almost exclusively on the percentage of fees retained by Telemarketing Associates, and that amount is recited repeatedly in petitioner's brief.[8] In this regard, the state's asserted interest in preventing fraud does not distinguish it from past cases, for this Court has expressly rejected the proposition that "there is an element of 'fraud' in a professional fundraiser's soliciting money for a charity if a high proportion of those funds are expended in fundraising." *Munson*, 467 U.S. at 968 n.16 (quoting *id.* at 980 (Rehnquist,

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[8] *See* Pet. Br. at 2, 4, 5, 6, 7, 9, 12, 44, 45, 48. The amount of the fee is the central concern of supporting amici, as well. *See, e.g.*, State Br. 12 (once it is established that 85 or 90 percent of the donation will not be spent on program services, "[h]ow that portion of the donation is in fact spent is *irrelevant*") (emphasis in original).

J., dissenting)). The Court has described as "fundamentally mistaken" the premise "that high solicitation costs are an accurate measure of fraud," because "[t]he percentage limitation is too imprecise a tool" to be consistent with the First Amendment. *Munson* 467 U.S. at 966 & 967 n.14. Simply put, "there is no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent." *Riley*, 487 U.S. at 793. As a result, this Court struck down a 25 percent limit on fundraising expenses in *Schaumburg* and *Munson*, and a restriction based on a sliding scale in *Riley*.[9] The same reasoning applies if the laws at issue in those cases had used an 85 percent limit on fees – the threshold that petitioner, in effect, advocates here.[10]

Petitioner's denial that it is seeking to impose a percentage-based fee limit rings hollow, and its proposed cure runs afoul of the second basic First Amendment rule cited above – that the government cannot compel fundraisers to disclose the amount of their fees. Illinois responds that it is not seeking to compel disclosure of the proportion of donations devoted to

[9]Under the regulatory scheme a 20 percent fundraising fee was presumed to be reasonable, a fee of 20 to 35 percent was considered unreasonable unless the solicitation involved "dissemination of information, discussion, or advocacy relating to public issues" and a fee above 35 percent was presumed unreasonable unless the fundraiser could justify it. *Riley*, 487 U.S. at 785 (quotation omitted).

[10]This was made clear in *Munson*, 467 U.S. at 967 n.15, for example, where the Court noted numerous state-approved exemptions for charities with fundraising costs that ranged as high as 80 to 85 percent. Such examples illustrate the "tenuous connection between low fundraising costs and a valid charitable endeavor." *Id.*

fundraising expenses, but instead seeks only to combat "the false impression created by what Respondents *did* say." Pet. Br. 44 (emphasis in original). This, however, is nothing but a semantic dodge; the state is seeking to impose criminal penalties on the respondent because, it claims, failure to disclose the percentage of fees it retained constitutes an "implied misrepresentation."

Under petitioner's proposed rule of law, a professional fundraiser that describes any of the charitable purposes to which donations will be devoted is subject to a fraud prosecution if it does not fully disclose how much money is used for administration and other expenses. *See, e.g.*, Pet. Br. 45 ("[t]he fact that Respondents kept 85 percent of all donations * * * constitutes evidence of the truth concealed by the misrepresentations"). By the state's reasoning, non-disclosure is the legal equivalent of misrepresentation unless the fundraiser says nothing at all about the charitable programs for which it is soliciting contributions. *See* Pet. Br. 46 ("once a fundraiser chooses to disclose certain facts about the use of donations, it cannot withhold other facts").

This standard creates a dilemma for professional fundraisers. Those with fees that are "too high" by some undefined standard acquire an obligation to disclose the proportion of proceeds devoted to fundraising, or else they face allegations of "constructive fraud." While petitioner makes quite clear its belief that respondent's fees were "too high," the state offers no way for a solicitor to determine what level of fees does not require full disclosure. In practical effect, Illinois would force charities to choose between their right to determine for themselves how to pay for solicitation drives and their First Amendment immunity from compelled speech.

But such an obligation is precisely what this Court in *Riley* said government could not require. Notwithstanding petitioner's strained analogy to defamation law and its claim that false statements of fact are unprotected speech, Pet. Br. 30, *Riley* stands for the proposition that the percentage of fees retained by a professional fundraiser is exactly the type of "fact" that the state cannot coerce. *Riley*, 487 U.S. at 797 (cases invalidating compelled speech "cannot be distinguished simply because they involved compelled statements of opinion while we deal with compelled statements of 'fact'"). It may well be, as the state maintains, that "how donations are used is often the most important factor in a person's decision to make a gift," Pet. Br. 10, but the *Riley* Court held that "a law compelling its disclosure would clearly and substantially burden * * * protected speech." *Id.* at 798. The state in *Riley* had sought to compel the disclosure of expenses devoted to fundraising to serve the very same interest identified here – "to dispel the alleged misperception that the money [people] give to professional fundraisers goes in greater-than-actual proportion to benefit charity." Nevertheless, this Court invalidated the requirement even though it understood the "factual information might be relevant to the listener, and * * * could encourage or discourage the listener from making a political donation." *Id.*

Lower courts have been equally skeptical of governmental efforts to curb fraud by requiring the disclosure of fundraising expenses. Courts have struck down requirements compelling disclosure of how collected funds are used;[11]

[11] *See, e.g., Texas State Troopers Ass'n. v. Morales*, 10 F. Supp. 2d 628, 632-634 (N.D. Tex. 1998) (invalidating required disclosure of amount retained by fundraiser when charity receives less than 90 percent of funds collected); *Indiana Voluntary*

limits on the compensation paid to professional solicitors;[12] a criminal fraud law compelling disclosure of the percentage of contributions remitted to a charity;[13] and a statute requiring fundraisers to submit solicitation scripts for governmental review.[14] The attempt by Illinois in this case to use the law

Firemen's Ass'n v. Pearson, 700 F. Supp. 421, 442-447 (S.D. Ind. 1988) (invalidating statute requiring disclosures of fundraisers' fee arrangements with charities); *Maine v. Events Int'l, Inc.*, 528 A.2d 458, 461-62 (Me. 1987) (striking requirement that solicitor disclose allocation of contributions when less than 70 percent of funds are expended for charitable program services), *cert. denied*, 487 U.S. 1234 (1988).

[12] *See, e.g., Shannon v. Telco Communications, Inc.*, 824 F.2d 150, 151-54 (1st Cir. 1987) (invalidating statute prohibiting professional solicitors from receiving compensation in excess of 20 percent of total funds raised); *Bellotti v. Telco Communications, Inc.*, 650 F. Supp. 149, 151-153 (D. Mass. 1986) (striking down cap on compensation professional fundraisers may receive), *aff'd*, 824 F.2d 150 (1st Cir. 1987); *Heritage Publ'g Co. v. Fishman*, 634 F. Supp. 1489, 1503-05 (D. Minn. 1986) (enjoining enforcement of statute limiting amount charities can spend on management, general costs, and fundraising costs). *See also Gospel Missions of Am. v. City of Los Angeles*, 298 F.3d 1099, 1106-07 (9th Cir. 2002) (vacating district court's holding on constitutionality of information card that based endorsement of solicitors on percentage of funds paid as expenses).

[13] *People v. French*, 762 P.2d 1369, 1374-75 (Colo. 1988) (holding unconstitutionally overbroad criminal statute that compelled fundraisers who charged fees in excess of 50 percent of funds collected to disclose that charities received less than half of contributions).

[14] *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225, 1232-34 (4th Cir. 1989) (invalidating as prior restraint on speech

of fraud to coerce "high cost" solicitors to disclose their fees cuts against the grain of this well-established body of law.

B. The State's Case-By-Case Approach Does Not Reduce Constitutional Concerns

Petitioner seeks to avoid the clear First Amendment limits on the regulation of charitable solicitations by arguing that an individual fraud prosecution like the one brought against respondent is the type of narrowly tailored approach this Court endorsed in *Schaumburg*, *Munson* and *Riley*. Pet. Br. 23-30. But the state confuses its ability to prosecute fraud with its discretion within constitutional bounds to define what constitutes fraud. Here, Illinois has proposed a definition of "constructive fraud" in an effort to criminalize precisely the types of activities this Court has held to be constitutionally protected, and its case-by-case approach does not cure the problem.

Under the standard petitioner advocates, the state could follow a policy of prosecuting any solicitor who retained 85 percent of donations received (or some other arbitrary amount) if the fundraiser failed to disclose the proportion of the proceeds devoted to the charitable program. By the threat of prosecution, the state could achieve exactly the same outcome that is forbidden by this Court's holdings in *Riley*, *Munson*, and *Schaumburg*. Indeed, the state could initiate action against any charity that spent more than 25 percent of proceeds on fundraising expenses and did not disclose that fact in direct contravention of this Court's holdings in *Schaumburg* and *Munson*. Or, it could base its prosecutorial

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law requiring professional solicitors to submit scripts of oral solicitations to government agency), *cert. denied*, 495 U.S. 904 (1990).

decisions on a more flexible schedule of fundraising costs, contrary to the decision in *Riley*.

To be safe, solicitors would be compelled either to slash their fees to a level prosecutors deem acceptable or affirmatively divulge the details on how donations are spent. Even then, no solicitor could ever be completely free of fear from the government, for, as explained in more detail below, the standard for fraud advocated by the state – "what the public reasonably understood by Respondents' representations," Pet. Br. 42 – is incapable of precise application. Such a standard vests public officials with unbounded discretion to persecute unpopular causes. *See infra* 22-26. In this case, it is not the legal tool of fraud prosecutions that raises constitutional concerns; it is the range of situations to which that tool could be applied under petitioner's "constructive fraud" theory.

Contrary to petitioner's claims, imposing such a rule through common law and case-by-case application does not avoid the constitutional defects of the measures struck down in earlier cases. Since *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 708 (1931), it has been the law that "in passing upon constitutional questions the court has regard to substance and not to mere matters of form," and that any state restriction on speech "must be tested by its operation and effect." *See also Schneider v. State*, 308 U.S. at 161 ("courts should * * * examine the effect of the challenged legislation"); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572 n.17 (1996) ("The test is not the form in which state power has been applied but * * * whether such power has in fact been exercised.") (citation omitted).

In *Near*, the Court examined a state law that permitted public authorities to bring the publisher of a newspaper or

other periodical before a judge on a charge of publishing scandalous and defamatory matter. Once a prima facie case of "nuisance" was made, the publisher was required to show that his publication was true and published with good motives and for justifiable ends, or face an injunction. The Court described this as the "essence of censorship" even though the law called for such proceedings to be conducted case-by-case and the state was first required to make its case. 283 U.S. at 713. A similar principle was articulated in *New York Times Co. v. Sullivan*, 376 U.S. at 277-278 (1964) (First Amendment limits tort claims because of their impact on protected speech, and the "state rule of law is not saved by its allowance of the defense of truth").[15]

The same principles preclude Illinois from manipulating its law of fraud to achieve a result that could not be imposed by direct regulation. As this Court emphasized in *Munson*, 467 U.S. at 969, "whether the statute regulates before- or after-the-fact makes little difference." The "chill on the protected activity is the same" regardless whether the charity "is prevented from engaging in First Amendment activity by the lack of a solicitation permit or by the knowledge that its fundraising activity is illegal if it cannot satisfy the

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[15]This Court should reject petitioner's invitation to superimpose the "opinion-fact" analysis of *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) in this context, *see* Pet. Br. 32-35, because petitioner's "constructive fraud" standard cannot be applied without giving the government too much latitude to restrict speech. *See infra* 22-26. It has been observed that "[n]o task undertaken under the law of defamation is more elusive than distinguishing between fact and opinion," Robert D. Sack, SACK ON DEFAMATION § 4.1 (3d ed. 2002), and an attempt to apply the analysis in the context of charitable solicitations cannot be reconciled with *Schaumburg*, *Munson* and *Riley*.

percentage limitation." *Id.* It is also no answer that "standards for determining reasonable fundraising fees will be judicially defined" through cases such as the prosecution of respondent. *See Riley*, 487 U.S. at 793 (citation and internal quote omitted). "Speakers * * * cannot be made to wait for 'years' before being able to speak with a measure of security." *Id.* at 793-794.

Upholding the established constitutional norm will not impair prosecutions in cases of actual misrepresentation, nor will it require the states to "sit idly by and allow their citizens to be defrauded." *Id.* at 795. Law enforcement officials at both the federal and state levels have had – and will continue to have – the unfettered ability to prosecute schemes to induce donations by promising prizes or services that never materialize,[16] misrepresenting solicitors' identities and charitable programs,[17] or using faux charitable causes for personal financial gain.[18] But expanding the definition of fraud to include nondisclosure of high solicitation fees – as petitioner advocates here – is not necessary to preserve the

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[16]*See, e.g., United States v. Ciccone*, 219 F.3d 1078, 1080 (9th Cir. 2000); *United States v. Kinney*, 211 F.3d 13, 16 (2nd Cir. 2000), *cert. denied*, 531 U.S. 1079 (2001); *United States v. McDaniel*, 1998 WL 792291 at *1 (9th Cir. Nov. 13, 1998) (unpublished opinion); *United States v. Smith*, 133 F.3d 737, 741 (10th Cir. 1997), *cert. denied*, 524 U.S. 920 (1998).

[17]*See, e.g., Kinney*, 211 F.3d at 16 (2000).

[18]*See, e.g., People v. Knippenberg*, 757 N.E.2d 667, 670 (Ill. App. Ct. 2001); *United States v. Bennett*, 9 F. Supp. 2d 513, 517-518 (E.D. Pa.) *aff'd*, 161 F.3d 171 (3d Cir. 1998), *cert. denied*, 528 U.S. 819 (1999).

government's interest in effective law enforcement,[19] and, for the reasons described above, would undermine important constitutional principles.

C. The State Cannot Reduce the Level of Constitutional Protection Accorded to Professional Solicitors

The principal thrust of petitioner's complaint is that Telemarketing Associate's appeal for funds was fraudulent because of the for-profit nature of its business. *See, e.g.*, Pet. Br. 4 ("they did not state that they were for-profit fundraisers"). However, it appears petitioner's real concern is the fact that VietNow, the charity that received donated funds from the respondent, devoted too little of the proceeds to its various programs.[20] Nevertheless, the state directed its legal attack against Telemarketing Associates, the for-profit entity that all parties admit faithfully performed the terms of its contract. Petitioner and its supporting amici assume that

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[19]Contrary to the position taken by federal amici in this case, the FTC has not historically embraced the notion that non-disclosure of fees paid to fundraisers is an unfair or deceptive trade practice, but has focused instead on affirmative misrepresentations. *See, e.g., FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1169-70 (9th Cir. 1996); *FTC v. Saja*, 1997 WL 703399 at *1 (D. Ariz. Oct. 7, 1997); *FTC v. NCH, Inc.*, 1995 WL 623260 at *1-5 (D. Nev. May 25, 1995); *Civic Dev. Group, Inc.*, Consent Order, 125 F.T.C. 958, 959-60 (1998); *King Distrib. Co.*, Consent Order, 71 F.T.C. 1300 (1967); *National Trade Publications Serv., Inc.*, Order, 58 F.T.C. 706 (1961), *aff'd, National Trade Publications Serv. v. FTC*, 300 F.2d 790 (8th Cir. 1962).

[20]*See* Pet. Br. 24 n.21. The state cites figures from VietNow's IRS Form 990 to show the extent of funds that were devoted to program services.

they have greater ability to prosecute in this situation simply because the charity engaged a professional fundraiser.[21]

This assumption, however, is plainly wrong. It is well settled that a speaker does not forfeit constitutional immunity because he or she was paid to speak. *New York Times*, 376 U.S. at 266. The petitioner's argument misses the point of this Court's holdings in *Schaumburg*, *Munson* and *Riley*, which made clear that professional fundraisers have "an independent First Amendment interest in the speech, even though payment is received." *Riley*, 487 U.S. at 794 n.8; *Munson*, 467 U.S. at 955 n.6; *Schaumburg*, 444 U.S. at 631-633. The state's attempt to use its fraud statute to "reform" charitable solicitations is "little more than a variation of the argument rejected in *Schaumburg and Munson* that [the government's effort] is simply an economic regulation with no First Amendment implication." *Riley*, 487 U.S. at 790. It assumes incorrectly that the state has a greater interest in preventing fraud where a professional solicitor is involved. But as this Court emphasized in *Munson*, 467 U.S. 968 n.16, "[i]t is no more fraudulent for a charity to pay a professional fundraiser to engage in legitimate public educational activity than it is for the charity to engage in that activity itself." Ultimately, regulations that have the effect of discriminating between non- and for-profit solicitors are unconstitutional. *Riley*, 487 U.S. at 799-800.

In this regard, it is significant that the state is seeking to regulate speech rather than use other means at its disposal to

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[21]Similarly, the new FTC rules cited by the federal amici assume that the federal government may restrict certain telemarketing practices when non-profit entities engage for-profit call centers, but that the same calls are exempt from regulation when made by the non-profit organizations themselves. Fed. Br. 2.

protect Illinois residents. The state could simply inform its citizens of the uses to which VietNow devotes donated funds, since it has access to all the relevant information. *See* Pet. Br. 24 n.21. Such an approach to preventing fraud "may help make contribution decisions more informed, while leaving to individual choice the decision whether to contribute to organizations that spend large amounts on salaries and administrative expenses." *Schaumburg*, 444 U.S. at 638. But it is unconstitutional for the state to seek to impose criminal liability on the professional fundraiser for what it believes to be the unwise policies of the charity that hired it.

II. THE STANDARD ADVOCATED BY ILLINOIS WOULD GIVE GOVERNMENT UNBOUNDED DISCRETION TO BRING PROSECUTIONS AND WOULD CHILL PROTECTED SPEECH

Petitioner's claim that its use of individual prosecutions as a narrowly-tailored solution to the problem of fraudulent solicitation fails to account for the breadth of the substantive legal standard it asks this Court to approve. Its definition of "constructive fraud" or "implied misrepresentation" would permit the state to prosecute solicitors in the same situations that this Court held are constitutionally protected in *Schaumburg*, *Munson* and *Riley*. Worse, however, prosecutors would not be bound by any statutory limits, but would have unrestricted license to pursue "fraud" whenever they believe a fundraiser's fee is excessive in relation to any statement of charitable purposes.

The state appears to understand the extent to which it is seeking a relaxation of constitutional norms and asks this Court to give it greater latitude in which to accomplish its purported purpose. It suggests, for example, that the First Amendment does not require the elimination of "*any*

possibility of civil or criminal liability being imposed" on protected speech. Pet Br. 25 (emphasis in original). Petitioner argues that it need not propose "mathematically precise definitions," and that the First Amendment does not require the standard to be "narrowed with a 'buffer zone'" to give "breathing room" for questionable speech. *Id.* 27, 31. It should have more ability to prosecute, the state claims, because the speech (and/or the failure to disclose) at issue is speech "bordering on actual fraud." *Id.* 37. *See also* State Br. 13 (asking Court to reconsider *Riley*).

Petitioner's remarkable request for this Court to approve such an elastic standard ignores "the First Amendment's command that government regulation of speech must be measured in minimums, not maximums." *Riley*, 487 U.S. at 790. Petitioners seek to revive "the paternalistic premise," repeatedly rejected by this Court, "that charities' speech must be regulated for their own benefit." But the First Amendment "mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Id.* at 790-791. The lax standard petitioner seeks violates these basic principles.

A. The State's Proposed Standard for "Constructive Fraud" by Charitable Solicitors Permits Excessive Prosecutorial Discretion

Petitioner asks this Court to classify as unprotected speech "implied misrepresentations," which it claims encompasses the failure to disclose fundraising costs in any charitable solicitation where it considers the fees to be too high. Not only would such a standard undermine this Court's longstanding precedents governing charitable solicitations, but the proposed standard for "constructive fraud" is incapable of precise application.

Noting that this Court in *Riley* held that local governments could not base their regulation of charitable solicitation on the "reasonableness" of the fee, Illinois has proposed a variation: The touchstone for implied misrepresentation is "what the public reasonably understood" about how much of their donations would be devoted to charitable programs. Pet. Br. 42. Thus, while state and local governments cannot draft laws to set a percentage for what constitutes a "reasonable" fee, petitioner claims it is permissible for the public (speaking through the attorney general) to determine "reasonableness" on an ad hoc basis. Whereas solicitors seeking to comply with the ordinances struck down in the previous cases could be certain of compliance if they adhered to the prescribed percentages governing acceptable fees, the state here is seeking constitutional authority to prosecute based on what it describes as "almost infinite variations of human language." Pet. Br. 21. *See also* Federal Br. 23 (no "affirmative misrepresentation" is needed in order to impose liability for "implicit misrepresentation").

Petitioner's efforts to distinguish *Schaumburg*, *Munson*, and *Riley* merely reveal why its approach is even less constitutional than the ordinances at issue in those cases. There, a solicitor would at least know if it was in compliance with the law, even if the percentage-based standards infringed their rights. Here, however, a solicitor could never be certain when its fees might be considered "excessive" by the attorney general so as to require disclosure of the amount of its fee.[22]

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[22]The state amici, who ask this Court to overrule its past precedents, illustrate the extent to which they are seeking wide latitude to prosecute fundraisers and/or charities that they believe spend too much on fundraising. *See* State Br. 5 n.1 (citing examples of "excessive" fundraising fees ranging from 54.4 percent to over 80 percent).

It is no answer for petitioner to assert that the concept of "misrepresentation" is well-defined in the common law of fraud and that questions can be resolved through judicial construction. Pet. Br. 28. The standard would give local prosecutors virtually unlimited discretion to prosecute charitable solicitors in the first instance based on their perception that too much is being spent on fundraising.

For this reason, the Court has cautioned against regulating fundraisers "with the heavy hand that unbridled discretion allows" because it "affects the speech of the clients or causes with which they are associated." *Riley*, 487 U.S. at 801 n.13; *Munson*, 467 U.S. at 964 n.12 (charities cannot be forced to trade direct regulation of their speech for a scheme in which official has "unguided discretion"). This principle applies equally to laws involving the licensing of speech, as in *Munson* or *Riley*, and to situations like this case, where the risk comes from the prospect of discriminatory enforcement. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1050 (1991); *Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983); *Smith v. Goguen*, 415 U.S. 566, 572-573 (1974). Here, the virtually limitless discretion the state would enjoy is fraught with "potential for abuse [inherent in] open-ended grant[s] of discretion" and is thus inconsistent with the rule that "reliance upon official discretion in any significant degree would clearly run afoul" of established case law. *Schaumburg*, 444 U.S. at 642-43 & n.1 (Rehnquist, J., dissenting).

Petitioner's proposed "implied misrepresentation" standard is particularly threatening to "small or unpopular charities" who typically have higher fundraising costs "due to the difficulty of attracting donors" or because they must expend more resources getting their message out. *Riley*, 487 U.S. at 793-794. However, this Court has held that the First

Amendment precludes measures which "furnish[] a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'" *Kolender*, 461 U.S. at 360 (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972)). Petitioner's proposed expansion of the state's law governing fraud in charitable solicitations would allow the government "unconstitutional discretion in its enforcement." *City of Houston v. Hill*, 482 U.S. 451, 467 (1987) ("Far from providing the 'breathing space' that First Amendment freedoms need to survive * * * the ordinance is susceptible of regular application to protected expression."), quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963).

Petitioner's stated interest in prosecuting certain fundraisers whose fees presumably are too high in order to reduce "mounting public cynicism about *all* charities," Pet. Br. 39 (emphasis in original), only adds to this concern. By dividing the world into favored and disfavored solicitors, petitioner's approach increases the likelihood that the law will be used to "restrict First Amendment activity that results in high costs but is itself part of the charity's goal or that is simply attributable to the fact that the charity's cause proves to be unpopular." *Munson*, 467 U.S. at 967. It also "necessarily discriminates against small or unpopular charities, which must usually rely on professional fundraisers." *Riley*, 487 U.S. at 799. Indeed, such an imprecise standard may actually encourage discriminatory enforcement. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality op.). Accordingly, this Court should reject petitioner's proposed constitutional rule.

B. The Proposed Rule of Law Would Significantly Chill Protected Speech

The state's avowed purpose in this case is to compel charities to spend less on solicitation costs or else to disclose those costs, or both. Petitioners assertion that prosecutions for "implied misrepresentations" based on the amount of the solicitor's fee will not deter "legitimate speech," Pet. Br. 35-37, is based on the mistaken premise that solicitations are "legitimate" only if the fees are low or the amount of the fee is disclosed. This assumption, however, flatly contradicts this Court's holding in *Riley*, which made clear that compelling such disclosures would impose a significant burden on protected speech.

This Court emphasized that such a requirement would encourage professional fundraisers either "to quit the State or refrain from engaging in solicitations that result in an unfavorable disclosure." *Riley*, 487 U.S. at 800. The impact would be particularly pronounced in the case of professional teleservices fundraisers:

> [I]f the potential donor is unhappy with the disclosed percentage, the fundraiser will likely not be given a chance to explain the figure; the disclosure will be the last words spoken as the donor * * * hangs up the phone.

Id. The Court noted that such a legal regime necessarily would discriminate against professional solicitors compared to charities that use their own employees or volunteers. Accordingly, such a legal regime "will almost certainly hamper the legitimate efforts of professional fundraisers to raise money." *Id.* at 799.

The effect of such a legal requirement is the same, regardless whether it is imposed by ordinance or by common

law rule. Here, the state is quite clear about its intention to require full disclosure if the solicitor says anything at all about the charitable program.[23] Such a requirement would impose a direct chill on protected speech, contrary to this Court's holding in *Riley*.

CONCLUSION

For the foregoing reasons, and for those set forth in the respondents' brief, the judgment below should be affirmed.

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[23] Pet. Br. 48 (comparing its proposed standard to "disclosure obligation" of federal lobbying regulations). Federal amici acknowledge and support the coercive effect of the state's proposed constitutional standard. *See* Fed. Br. 10 ("the potential for fraud liability is only likely to cause [solicitors] to provide more complete information"); 27 ("the potential for fraud liability should * * * result in more speech rather than less").

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IN THE

Supreme Court of the United States

JAMES E. RYAN, ATTORNEY GENERAL OF ILLINOIS,
Petitioner,

v.

TELEMARKETING ASSOCIATES, INC., ET AL.,
Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF AMICUS CURIAE OF FREE SPEECH DEFENSE AND EDUCATION FUND, INC., CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND, AMERICAN TARGET ADVERTISING, INC., EBERLE COMMUNICATIONS GROUP, INC., GUN OWNERS FOUNDATION, ENGLISH FIRST, LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION, AND CITIZENS UNITED FOUNDATION IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE

Amici curiae, Free Speech Defense and Education Fund, Inc., Conservative Legal Defense and Education Fund, American Target Advertising, Inc., Eberle Communications Group, Inc., Gun Owners Foundation, English First, Lincoln Institute for Research and Education, and Citizens United Foundation, share a common interest in the proper construction of the Constitution and laws of the United States.[1]

Six of the *amici* are nonprofit organizations, five of which are tax-exempt under IRC Section 501(c)(3) — Free Speech Defense and Education Fund, Inc., Conservative Legal Defense and Education Fund, Gun Owners Foundation, Lincoln Institute for Research and Education, and Citizens United Foundation — and one of which is tax-exempt under IRC Section 501(c)(4) — English First. Each was established for purposes related to participation in the public policy process. They also communicate, or have communicated in the past, including the solicitation of funds, through a variety of means with the public. The other two *amici* — American Target Advertising, Inc. and Eberle Communications Group, Inc. — are for-profit companies which, *inter alia*, assist nonprofit organizations in developing and implementing direct marketing programs to the public.[2]

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[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief.

[2] These *amici curiae* requested and received the written consents of the parties to the filing of this *amicus curiae* brief. Such written consents, in the form of letters from counsel of record for the various parties, have been received and submitted to the Clerk of Court for filing. *See* Supreme Court Rule 37.3(a).

The *amici* believe that their perspectives on the issues in this case will be of assistance to the Court in deciding the pending matter. It is intended that this *amicus curiae* brief will bring to the attention of the Court relevant matter not already brought to the Court's attention by the parties, including the perspective of these nonprofit and for-profit organizations on the legal issues presented by the parties. In the past, each of the nonprofit *amici* has conducted research involving constitutional interpretation, and several have filed *amicus curiae* briefs in other federal litigation involving constitutional issues, including briefs before this Court.

The case now before this Court concerns the authority of government, purportedly acting in the public interest, to dictate or otherwise restrict the content of communications to the public from nonprofit organizations involving soliciting financial contributions through professional marketers and fundraisers. These *amici curiae*, whose own activities concern communications to the public that involve soliciting financial contributions, believe that the Attorney General's position herein presents a substantial threat of government encroachment on long-established First Amendment rights, and believe that this brief on the important constitutional principles at stake will be of interest and use to this Court.

STATEMENT OF THE CASE

This case comes to this Court on a writ of certiorari to the Supreme Court of Illinois. At issue is whether the state supreme court properly affirmed the dismissal of a thrice-amended civil complaint filed by the petitioner, state's Attorney General, James E. Ryan ("Attorney General"), against the respondents, Telemarketing Associates, Inc. and Armet, Inc., together with their director-owner, Richard Troia ("Telemarketers"), for having failed to state a cause of action

because the purported cause of action for "fraud" violated the First and Fourteenth Amendment guarantees afforded charitable solicitations.

In affirming the granting of Telemarketers' motion to dismiss, the Illinois Supreme Court accepted, as true, "all well-pled facts" in the Attorney General's third amended complaint. People *ex rel.* Ryan v. Telemarketing Associates, Inc. *et al.*, 763 N.E.2d 289, 291 (Ill. 2001) (hereinafter Ryan v. Telemarketing). Accordingly, the court found that the corporate Telemarketers had negotiated a contract with VietNow National Headquarters ("VietNow") to, among other services, solicit funds on VietNow's behalf, and that, pursuant to the terms of that contract, Telemarketing Associates, Inc., "retained 85% of the gross collections in the State as its total compensation for all efforts and costs associated with the Marketing Program." *Id.*, 763 N.E.2d at 291.

The court further found that according to the contracts attached by the Attorney General to the complaint and thereby made a part of the pleadings, the Marketing Program was not just limited to raising funds, but included "producing, publishing, editing and paying all costs for the annual publication of more than 2,000 copies of an advertising magazine which would 'increase community awareness of [VietNow].'" *Id.*, 763 N.E.2d at 297. Additionally, the program obligated Telemarketer Armet to produce a quarterly publication, "[a]t least 30% [of which] was to be devoted to editorial content provided by VietNow," as part of an "advertising and public awareness campaign." *Id.*, 763 N.E.2d at 298. In light of the fact that the Marketing Program was paid for by the funds solicited by Telemarketers, the state court found that "[t]he fund-raising services ... provided ... were inextricably intertwined with the advancement of VietNow's philosophy and purpose." *Id.*, 763 N.E.2d at 298.

Thus, Telemarketers served as VietNow's agent to promote the organization, educate the public, prepare, and distribute publications, all of which are paid for out of solicited funds, VietNow benefitted not only by receiving 15 percent of the gross proceeds, but also by receiving a valuable house list of supporters as well as the additional services performed on behalf of VietNow's tax-exempt mission.

The court found that there was nothing in the complaint "suggest[ing] that [Telemarketers] have not fully complied with the terms of their contracts," and also found that VietNow had never "expressed dissatisfaction with the fund-raising services provided by [them]," having received from Telemarketers' solicitation efforts on its behalf "an amount just under 15% of the gross receipts." *Id.*, 763 N.E. 2d at 291. At the same time, the court accepted as true "that retention of 85% of donated funds goes well beyond any reasonable expectation of the public," as alleged by the Attorney General in "the affidavits of 44 VietNow donors who assert that they would not have given money to the charity had they known how little of their donation was directed to the intended cause." *Id.*, 763 N.E.2d at 293.

On the strength of the donor affidavits, the Attorney General contended that "the complaint is legally sufficient because it sets forth all of the elements necessary to state a valid cause of action for common law fraud." *Id.*, 763 N.E.2d at 293. The state supreme court disagreed, dismissing the third amended complaint on the ground that it did not contain a sustainable charge of common law fraud. *Id.*, 763 N.E.2d at 299. According to the opinion below, the "offenses" contained in the Attorney General's third amended complaint "were premised on the fact that [Telemarketers] retained 85% of charitable funds collected on behalf of VietNow, and, when soliciting, failed to inform donors that only 15% of their

contribution would be distributed to charity." *Id.*, 763 N.E.2d at 291-292.

Indeed, beginning with the initial complaint the Attorney General had coupled a common law fraud charge with a claim that Telemarketers had "breach[ed] ... their duty as fiduciaries of charitable assets." Both charges were made "because the fees charged by [Telemarketers] for conducting the solicitation were 'excessive in amount and an unreasonable use and waste of charitable assets,' and because [Telemarketers] did not advise donors that only 15% of the funds raised would be turned over to VietNow." *Id.*, 763 N.E.2d at 291-292. Even though the Attorney General included, in his second amended complaint, an additional charge that Telemarketers had secured donations to VietNow by "obtain[ing] money from donors under false pretenses," the state supreme court found that the Attorney General's factual premise for this charge remained unchanged: Telemarketers had "fail[ed] to reveal to donors the percentage of the contribution which would actually go to the charity." *Id.*, 763 N.E.2d at 292. This claim, in turn, was based upon an alleged "violation of Section 15(b)(5) of the Solicitation for Charity Act ... which requires professional fund-raisers to identify 'fully and accurately' the purpose for which funds are solicited." *Id.*, 763 N.E.2d at 292.

Additionally, by not seeking an individualized common law damage remedy tailored to a traditional fraud claim, or a similarly individualized criminal remedy of fine or incarceration proportionate to a traditional false pretenses claim, the state supreme court found that the Attorney General's complaint did not constitute "an instance of individual litigation." *Id.*, 763 N.E.2d 297. Rather, the court below found that the complaint "seeks to enjoin [Telemarketers] from conducting any future fund-raising activities based on allegations that [Telemarketers], when

soliciting on behalf of VietNow, committed 'fraud' because ... [Telemarketers] retained 85% of the gross receipts and failed to disclose this information to donors." *Id.*, 763 N.E.2d at 297. Thus, the state supreme court rejected the Attorney General's contention that "the problem of fraud is being attacked, not through the application of 'broad prophylactic' ordinances or statutes affecting all fund raisers..., but through enforcement of the state's antifraud laws against specific defendants for 'specific instances of deliberate deception.'" *Id.*, 763 N.E.2d at 296. Accordingly, the court concluded that "the Attorney General's complaint is, in essence an attempt to regulate [Telemarketers'] ability to engage in [charitable solicitation] based upon a percentage-rate limitation." *Id.*, 763 N.E.2d at 297.

Having found that the complaint "incorrectly presumes that there is a nexus between high solicitation costs and fraud," the state supreme court ruled that the complaint was "indistinguishable from the regulatory programs struck down in" Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980), Secretary of State v. Joseph H. Munson Co., 467 U.S. 947 (1984), and Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988). Ryan v. Telemarketing Associates, 763 N.E.2d at 299.

SUMMARY OF ARGUMENT

Petitioner, the Illinois Attorney General, has argued that nondisclosure at the point of solicitation by Respondents, Telemarketing Associates, *et al.* ("Telemarketers") — of the division of proceeds donated to the charitable organization (VietNow) represented by Telemarketers — constituted fraud, but he is in error, both factually and legally. As authoritatively determined by the Supreme Court of Illinois, the Illinois Attorney General's attempt — under the guise of a fraud claim

— to sue Telemarketers for the nondisclosure of the division of proceeds was in reality an effort to regulate professional charitable solicitation contracts, an impermissible goal under this Court's rulings in Village of Schaumburg v. Citizens For a Better Environment, 444 U.S. 620 (1980), Secretary of State v. Joseph H. Munson Co., 467 U.S. 947 (1984), and Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988). The holding of the Supreme Court of Illinois was correct, and the Attorney General should not be able to circumvent, by litigation, this Court's proscription against unconstitutional legislation.

This is a charitable solicitations case, which is governed by the rules authoritatively laid down by this Court in a number of prior cases, including Schaumburg, Munson, and Riley. By mischaracterizing the nature of the speech in issue as akin to commercial speech or defamation, the Illinois Attorney General has relied upon a false jurisdictional premise in his effort to undo this Court's prior rulings rejecting governmental attempts to regulate free speech.

The government's claim of plenary regulatory power over allegedly false or misleading ideas in the marketplace of ideas is also constitutionally illegitimate, as consistently ruled by this Court in cases dating back many decades. Charitable solicitations belong in the First Amendment marketplace of ideas, not in the commercial marketplace of goods and services, and the federal *amici* supporting the Attorney General are mistaken in their attempt to justify the complaint as having complied with this Court's First Amendment rulings governing commercial speech.

Although the State of Illinois has a legitimate interest in prohibiting fraud, that interest is not served by the bootstrapping efforts of the Attorney General in this case in a

blatant attempt to regulate charitable solicitations under the pretense of an action for fraud coupled with a claim that funds raised by charitable solicitations are held in trust for the State. The Illinois Attorney General's actions, if allowed, abridge the freedoms of speech and the press by taking unconstitutional editorial control over the way that solicitations are made and by imposing an unconstitutional prior restraint on First Amendment activities.

Finally, the Illinois Attorney General's generalized claim that moneys raised by charitable solicitations are held in trust for the benefit of the State unconstitutionally abridges the First Amendment right of association. That right empowers each individual to decide what to say and how to say it, and what to hear and how to respond to it. Under the guise of a cleverly conceived — but fundamentally flawed — fraud claim, the Attorney General has attempted to unconstitutionally interpose the power of the State, thereby depriving VietNow and its supporters of their associational rights.

ARGUMENT

I. THE ATTORNEY GENERAL'S COMPLAINT, AS AUTHORITATIVELY CONSTRUED BY THE ILLINOIS SUPREME COURT, IS DESIGNED TO IMPOSE A CONSTITUTIONALLY IMPERMISSIBLE PERCENTAGE-BASED LIMITATION ON THE CONTRACT TERMS OF PROFESSIONAL FUNDRAISERS AND THEIR CHARITABLE CLIENTS.

In his brief, the Attorney General has characterized the complaint at issue in this case as one "alleging common law fraud as well as violations of several state anti-fraud statutes." Pet. Br. 2. Similarly, in their *amici curiae* brief, the United States and the Federal Trade Commission ("Federal *amici*") have asserted that the essence of the Attorney General's complaint is one alleging fraud. *US/FTC Amici* Br. 6-7. Both views are at odds with the Illinois Supreme Court's view of the complaint. Neither the Attorney General nor the Federal *amici*, however, has given any good reason for this Court to reject the state supreme court's characterization of the complaint.

In Reitman v. Mulkey, 387 U.S. 369 (1967), this Court faced a situation similar to the one presented here. At issue in Reitman was whether a state constitutional amendment was forbidden by the equal protection clause of the 14th Amendment because it constituted the state's "encouragement" of private racial discrimination. *Id.*, 387 U.S. at 370. This Court noted after a careful review of the history of the amendment, and against the backdrop of this Court's "state action" decisions in relation to the equal protection clause — that the California Supreme Court had determined — as a matter of state constitutional policy, that the amendment established a "constitutional right to *privately* discriminate," not just a repeal of existing laws prohibiting such discrimination. *Id.*, 387 U.S. at 370-71, 373-77. In striking down this prohibited state action, this Court accepted the California court's characterization of the amendment as "intended to authorize ... racial discrimination in the housing market," and thus, "the right to discriminate is now one of the basic policies of the State." *Id.*, 387 U.S. at 381.

In this case, the Illinois Supreme Court construed the Attorney General's complaint as one seeking "to enjoin defendants from conducting any future fund-raising activities based on allegations that ... the statements made by defendants during solicitation are ... 'false' **only** because defendants retained 85% of the gross receipts and failed to disclose this information to donors." Ryan v. Telemarketing, *supra*, 763

N.E.2d at 297 (emphasis added). As such, the Illinois Supreme Court concluded that "the Attorney General's complaint is, in essence, an attempt to regulate the defendants' ability to engage in a protected activity [i.e., charitable solicitation] based upon a percentage-rate limitation." *Id.*, 763 N.E.2d at 297. It is this construction, placed upon the complaint by the highest court in the state, that is being challenged by the Attorney General. That challenge should be rejected. The Illinois Supreme Court's reading of the complaint should be accepted by this Court as an authoritative construction of state law. *See* Reitman v. Mulkey, *supra*, 387 U.S. at 373-74.

The Attorney General's complaint was never limited to a simple charge of fraud, as the Attorney General and the Federal *amici* would have this Court believe. *See* Pet. Br. 2; US/FTC Br. 3. Rather, from the beginning, the Attorney General laid alongside the fraud charge another claim — that Telemarketers "breach[ed] their duty as fiduciaries of charitable assets," supported by the allegation that "the fees charged by defendants for conducting solicitation were 'excessive in amount and an unreasonable use and waste of charitable assets'" — in order to sustain the state's fraud claim based upon "defendants' [failure to] advise donors that only 15% of the funds raised would be turned over to VietNow." Ryan v. Telemarketing, *supra*, 763 N.E.2d at 291-292. Even when the Attorney General added, in his second amended complaint, the false pretenses charge, that charge was coupled with a further amendment claiming that "defendants' solicitations were in violation of section 15(b)(5) of the Solicitation for Charity Act ... which requires professional fund-raisers to identify 'fully and accurately' the purpose for which funds are solicited." *Id.*, 763 N.E.2d at 292.

Not only do the substantive claims of the Attorney General's complaints belie his contention before this Court that this is a simple case of fraud, his remedial claims do so as well.

If this truly were an "instance of individual litigation," as the Attorney General has claimed, then it would have been a straight-up civil fraud claim seeking a money damage award on behalf of allegedly defrauded donors, or a single complaint seeking a penalty authorized by the state's general fraud statute. Instead, the Attorney General sought "forfeiture of [Telemarketers'] collected fees," a "surcharge [on the] defendants for assets found to have been misspent or misused," and "an injunction prohibiting defendants from conducting any future fund-raising services," all of which remedies and penalties were, as the Illinois Supreme Court found, "authorized by section 9 of the Solicitation for Charity Act," not by a common law or statutory fraud action or a false pretenses criminal charge. *Id.*, 763 N.E.2d at 292.

In short, the Attorney General's claim before this Court that he was simply pursuing "the enforcement of the state's antifraud laws against specific defendants for 'specific instances of deliberate deception,'" not "through the application of 'broad prophylactic' ordinances or statutes affecting all fund-raisers," was rightly rejected by the Illinois Supreme Court:

> Finally, we note that, although the Attorney General's complaint is aimed at regulating the fund-raising efforts of the defendants, this case has far-reaching implications for all fund-raisers. If a complaint such as the one at issue in this case is allowed to proceed, all fund-raisers in this state would have the burden of defending the reasonableness of their fees, on a case-by-case basis, whenever in the Attorney General's judgment the public is being deceived about the charitable nature of a fund-raising campaign because the fund-raisers' fee was too high. [*Id.*, 763 N.E.2d at 296, 299.]

Having rightfully rejected the Attorney General's claim that he was simply "combating fund-raising fraud [by means of] "individual litigation," not enforcing a "broad regulatory statute" (*id.*, 763 N.E.2d at 297), the Illinois Supreme Court also correctly found that the Attorney General was wrongfully attempting to accomplish by litigation what had been attempted by the legislation found unconstitutional in Schaumburg, Munson, and Riley:

> [W]e conclude that the Attorney General's complaint suffers from the same 'fundamental flaw' described by the Supreme Court in *Schaumburg, Munson* and *Riley*. The complaint incorrectly presumes that there is a nexus between high solicitation costs and fraud and attempts to regulate defendants' constitutionally protected solicitations on that basis. Contrary to the Attorney General's contentions, the complaint is not a 'less intrusive' means of regulation, but is, instead indistinguishable from the regulatory measures struck down in *Schaumburg, Munson* and *Riley*. [*Id.*, 763 N.E.2d at 299.]

There is no sound reason for this Court to reject the Illinois Supreme Court's judgment that the Attorney General's complaint in this case has far-reaching implications for all fundraisers in that the complaint was designed to impose "a constitutionally impermissible percentage-based limitation on defendants' ability to engage in a [First Amendment] protected activity," as established by this Court in the Schaumburg, Munson, and Riley trilogy. *See id.* After all, it is the Illinois Supreme Court, not this Court, that has knowledge of the facts and circumstances concerning the complaint, its potential impact and the milieu in which the complaint would operate. *See, e.g.*, People *ex rel.* Ryan v. The World Church of Creation, 760 N.E.2d 953, 961 (Ill. 2001) ("The courts of this State are

in accord in applying a broad legal definition of 'charity' to include almost anything that tends to promote the improvement, well-doing and well-being of social man.") (Citation omitted.)

Accepting the Illinois Supreme Court's judgment would, therefore, be consistent with the disposition of the equal protection claim in Reitman v. Mulkey, *supra,* where this Court found "no sound reason for rejecting [the California Supreme Court's] judgment" that the constitutional amendment in that case reflected a constitutionally impermissible state regulatory scheme sanctioning private racial discrimination in the housing market, because "the California court [was] armed ... with the knowledge of the facts and circumstances concerning the passage and potential impact [of the constitutional amendment], and [was] familiar with the milieu in which the provision would operate." *Id.*, 387 U.S. at 376-378.

II. THE COMPLAINT, AS AUTHORITATIVELY CONSTRUED BY THE ILLINOIS SUPREME COURT, RESTS UPON A CONSTITUTIONALLY IMPERMISSIBLE PREMISE WHICH HAS BEEN CONSISTENTLY REJECTED BY THIS COURT.

Relying upon selected excerpts from Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974), and Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976), the Attorney General has attempted to justify his entire case on the ground that "fraudulent charitable solicitations are not protected speech under the First Amendment," claiming that such solicitations are the equivalent of "false statements of fact [that] 'are no essential part of any exposition of ideas.'" Pet. Br. 13. In reliance upon Schneider v. State, 308 U.S. 147, 164 (1939), the Federal *amici* have made a comparable claim, asserting that "fraudulent

charitable solicitations," because they are "fraudulent speech," are "unprotected," being outside "the marketplace of ideas" preserved by the First Amendment. US/FTC *Amici* Br. 6-7. Neither of the cases cited by the Attorney General, nor the one cited by the Federal *amici,* nor the relevant text of the applicable First Amendment guarantees, supports the jurisdictional premise upon which the Attorney General has rested his complaint.

A. Jurisdiction over the Making of False Statements of Fact in the Marketplace of Ideas Protected by the First Amendment Must Rest upon a Sustainable Basis Other than Regulating Protected Speech.

In Schaumburg, Munson, and Riley, this Court has squarely held that charitable solicitations belong in the First Amendment's protected marketplace of ideas, because such solicitations are so intertwined with protected speech that they cannot be separated.[3] Schaumburg, *supra,* 444 U.S. at 628-32;

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[3] The marketplace of ideas is a veritable field of competition for contributions among charities, issue advocacy groups, educational organizations, political action committees, and candidates for public office. These *amici* include both tax-exempt entities and for-profit consultants that rely on marketing programs similar in many ways to the arrangement between VietNow and Telemarketers. Such robust competition as exists among such charitable organizations, dependent upon the public for support, is easily thwarted by states' attorneys general and other government officials. Larger charities often have lower fundraising costs because they solicit and accept government funds and bequests from the wealthy. These larger charities can encourage their allies in government to pursue regulatory policies which seek to keep out upstart competition. Many of these "upstarts" seek to communicate with many people of lesser financial means who might otherwise never hear certain positions on public policy, social, moral, and religious issues, but for appeals to them for relatively small contributions. Such "grassroot" outreaches are particularly important in today's society wherein many feel "left out" by other nonprofits which focus on potential high dollar donors who can be solicited with lower costs than mass-based groups. Accordingly, this Court has extended full First Amendment protection to mass-based communications by telemarketing and direct mail in recognition of the important role that such efforts, however high the fundraising costs are to attract small donors, play in making the freedoms of speech, press, association, and petition a reality in every American's life. *See* Schaumburg, *supra*, 444 U.S. at 635. The costs of skillfully targeting educating and motivating citizens to promote the VietNow message may be greater than, for example, those of wealthier and more established charities, such as the American Red Cross or the American Cancer Society, but the marketplace of ideas should not just be available to the established and well-heeled. Without the services of professional telemarketers equipped with the necessary expertise and equipment, such as the one in this case, many small, new, and unpopular nonprofits could not even enter the marketplace due to the costs of personnel, capital equipment, and access to lists of potential new donors.

Munson, *supra,* 467 U. S. at 959-64; Riley, *supra,* 487 U.S. at 787-88. In so ruling, this Court has rejected the Attorney General's tactical ploy in his complaint to proceed only against the commercial firm so as to isolate Telemarketers from their nonprofit principal, VietNow, in an effort to invert their principal/agent relationship so that it appears that VietNow serves Telemarketers' financial interest, rather than Telemarketers serving VietNow's communicative interests as the state supreme court found. *Compare* Pet. Br. 9 ("Deception for profit is not protected speech under the First Amendment") *with* Ryan v. Telemarketing, *supra,* 763 N.E.2d at 298 ("[F]raud cannot be defined in such a way that it places on solicitors the affirmative duty to disclose to potential donors, at the point of solicitation, the net proceeds to be returned to the charity.").

According to the Attorney General's theory of the case, however, Telemarketers had an affirmative duty to tell the donors, at the point of solicitation, the percentage of funds that would go to VietNow under its contract with Telemarketers.

Otherwise, the Attorney General maintains, potential donors would be misled. As demonstrated by the court below, however, the Attorney General's assertion is simply wrong. *See id.*, at 298. The percentage of funds turned over to the charity is **not** an accurate measure of the amount of the proceeds used "for" a charitable purpose, and this Court (*e.g.*, Munson 467 U.S. at 967 n. 16) has so stated. Ryan v. Telemarketing, *supra,* 763 N.E.2d at 298. The services provided by Telemarketers' Marketing Program included the development of substantive materials advancing VietNow's mission, and the fund-rasing services "were inextricably intertwined with the advancement of VietNow's philosophy and purpose." *Id.* Thus, the Attorney General's very premise, upon which he attempted to justify the State's control over Telemarketers' communications, was fatally deficient.[4]

Furthermore, it is not constitutionally legitimate for the government to step in to correct even a "misleading" communication in the First Amendment's free marketplace of ideas. Indeed, in Cantwell v. Connecticut, 310 U.S. 296 (1940), a unanimous Supreme Court observed:

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[4] As a politician seeking the office of Governor of Illinois in 2002; Attorney General Ryan, not surprisingly, funded his campaign principally through large donations. His official candidate committee, Citizens for Jim Ryan, during one six month period,, raised $3,266,835 in individual and corporate contributions, with an *approximate average itemized (over $50.00) contribution of $1,365* (based on a sample using the first 248 contribution on that report) in that six-month period, while raising only $96,867 in nonitemized contribuitons. No doubt General Ryan had a higher fund raising cost for the small contributions he received, but they nonetheless were inextricably intertwined with his effort to obtain personal commitments of support from many voters. Citizens for Jim Ryan D-2 Semi-Annual Report, 1/1/2002 thru 6/30/2003, http://www.elections.state.il.us/CDS/pages/D2Semi.asp?FiledDocID=234538&ID=1453&Re.

> [I]n the realm of religious faith, and in that of political belief [it is commonplace] [t]o persuade others [by] resorts to exaggeration, to vilification ... **and even to false statement**... But the people of this nation have ordained in light of history, that, in spite of the probability of excesses and abuses, these liberties are in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy. [*Id.*, 310 U.S. at 310 (emphasis added).]

Thirty-four years later, in the same vein, this Court observed that "[a]lthough the erroneous statement of fact is not worthy of constitutional protection, it is inevitable in free debate ... [a]nd punishment of error runs the risk of inducing cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press." Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974). Accordingly, this Court has proclaimed that, in the marketplace of ideas protected by the First Amendment, "there is no such thing as a false idea, [and] [h]owever pernicious an opinion may seem, we depend upon its correction not on the conscience of judges and juries but on the competition of other ideas." *Id.*, 418 U.S. at 339-340. As Justice Potter Stewart put it:

> Ideological expression, be it oral, literary, pictorial, or theatrical, is integrally related to the exposition of thought — thought that may shape our concepts of the whole universe of man. Although such expression may convey factual information relevant to social and individual decision making, it is protected by the Constitution, whether or not it contains factual representations and even if it includes inaccurate assertions of fact. Indeed, disregard of the 'truth' may be employed to give force to the underlying idea expressed by the speaker. 'Under the First Amendment

> there is no such thing as a false idea,' and the only way that ideas can be suppressed is through 'the competition of other ideas.' [Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 777 (1978)].

In essence, the free marketplace of ideas established by the freedoms of speech, press, assembly, and petition is the self-governing market of the people. Thus, it is not for the government to decide — particularly not here, where no fraudulent statement possibly exists — whether a person has the privilege of speaking to another, and upon what terms, but it is for the people themselves to decide whether to speak, and what to say. and whether to listen, and what to believe. Martin v. City of Struthers, 319 U.S. 141, 144 (1943). It is not for the government to step in, as the people's protector, and determine what information should be included in the communication, in an effort to purify the marketplace. Rather, as Justice Holmes put it in his now-vindicated dissent in Abrams v. United States, 250 U.S. 616, 630 (1919), "the best test for truth is the power of a thought to get itself accepted in the competition of the market," not whether they meet some standard of truthfulness as set by a government official, legislative, executive or judicial. *See* Hustler Magazine v. Falwell, 485 U.S. 46, 50-51 (1988).

Under the constitutionally-established regime of First Amendment freedoms, then, the Attorney General **cannot** justify an effort to prohibit "fraudulent statements" by the bald assertion that such statements "are no essential part of any exposition of ideas," and therefore, are "unprotected speech." Pet. Br. 13. Rather, he must first demonstrate that the government has articulated a valid fraud claim. And this, as pointed out by the Illinois Supreme Court, the Attorney General failed to do. Instead, the Attorney General's complaint is

erroneously premised upon the existence of a duty to "reveal to potential donors, at the point of solicitation, the amount of charitable proceeds turned over to a charity," and thus, "[is] a [forbidden] content-based regulation of protected speech which [is] unduly burdensome and not narrowly tailored." *See* Ryan v. Telemarketing, *supra*, 763 N.E.2d at 296, citing Riley. Additionally, the Attorney General's "compelled disclosure requirement is mistakenly rooted in the presumption "that a charity derives no benefit from funds collected but not disbursed to it." Accordingly, the complaint, on its face, does not even contain an allegation that what Telemarketers said was untrue, much less fraudulent. Instead, if the Attorney General is allowed to proceed in this complaint he would create the **false impression** that the "net proceeds returned" to VietNow accurately reflect the amount of funds which go toward VietNow's charitable purposes. *Id.*, 763 N.E.2d at 298.

B. The Standards Governing False Statements with Respect to Commercial Speech Do Not Apply to Statements with Respect to Charitable Solicitations.

Building upon the sentence — "Untruthful speech, commercial or otherwise, has never been protected for its own sake" — extracted from this Court's opinion in Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, *supra,* the Attorney General has attempted to break away from the historic differences between charitable solicitations and commercial speech, in order to justify his aim to impose upon charitable solicitations the same First Amendment standards governing misrepresentations in the sales of goods and services.[5] When it comes to the protections of the speech,

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[5] The Federal *amici* have likewise become enthusiastic supporters of this dangerous tactic, liberally sprinkling their brief with citations to commercial fraud cases, such as Stewart v. Wyoming Cattle Ranche Co., 128 U.S. 383

press, and association guarantees of the First Amendment, this Court has never treated charitable solicitations and commercial transactions the same, and for good reason.

In Schneider v. State, 308 U.S. 147 (1939), relied upon by the Federal *amici,* this Court struck down a comprehensive regulatory scheme as it applied to door-to-door solicitation of contributions to a religious cause. *Id.*, 308 U.S. at 157-59, 163-64. In doing so, this Court made clear that its decision was "not to be taken as holding that commercial soliciting and canvassing may not be subject to such regulation as the ordinance requires." *Id.*, 308 U.S. at 165. Thus, in 1951, this Court upheld a prohibition on door-to-door solicitation of magazine subscriptions, emphasizing that the "selling [brings] into the transaction a commercial feature" and distinguishing its prior decision in Martin v. Struthers, *supra,* as a case involving "no element of the commercial." Breard v. Alexandria, 341 U.S. 622, 642-643 (1951).

While Schneider and Breard were decided under this Court's now discarded assumption that commercial speech was wholly unprotected by the First Amendment (*see* Valentine v. Chrestensen, 316 U.S. 52 (1942)), the extension of First Amendment protection to truthful commercial advertising has not removed First Amendment protection for what a government official may perceive to be untruthful noncommercial speech. Rather, as this Court has repeatedly emphasized, the First Amendment protection extended to "commercial speech" is governed by a much lower standard than the noncommercial, as is clearly evidenced by the special four-part test applied to commercial speech. *See, e.g.,*

(1888), and Donaldson v. Read Magazine, Inc., 333 U.S. 178 (1948). These cases are inapposite.

Thompson v. Western States Medical Center, 535 U.S. ___, ___, 152 L.Ed.2d 563, 573 (2002).

Since Schaumburg v. Citzens for a Better Environment, *supra,* this Court has consistently refused to apply the commercial speech test to charitable solicitations, thereby reaffirming the principle in Schneider v. State, *supra*, that solicitation of money as part of the promotion of ideas is constitutionally distinct from the solicitation of money pursuant to a commercial transaction. *See* Schaumburg, *supra,* 444 U.S. at 628-32; Riley, *supra,* 487 U.S. at 787-88.

With respect to commercial speech, the threshold constitutional test is whether the speech at issue "concerns unlawful activity or is misleading." If it is, then such speech is "not protected by the First Amendment." Thompson v. Western States Medical Center, *supra*, 535 U.S. at ___, 152 L.Ed.2d at 573. Throughout his brief, the Attorney General has mistakenly applied this threshold test to charitable solicitations. Thus, his Summary of Argument begins as follows:

> The First Amendment does not give a fundraiser the right to solicit charitable donations by fraudulent means, including misrepresentations about how the donated funds will be used. Deception for profit is not protected speech under the First Amendment, and this is as much the case for half-truths and other implied misrepresentations long recognized at common law as it is for blatant lies. That such fraud is perpetrated by someone seeking money in the name of a charity does not make it protected speech. [Pet. Br. 9.]

He then proceeds to undergird his entire argument with the claim: "Fraudulent charitable solicitations are not protected speech under the First Amendment." Pet. Br. 12. Thus, by

relying upon his own allegation that the charitable solicitations at issue are fraudulent, the Attorney General has bootstrapped his claim that the statements made by the charities' for-profit telemarketer are unprotected by the First Amendment.

Such reasoning is specious, and ignores entirely this Court's key pronouncements in Schaumburg, Munson, and Riley. The Attorney General is attempting to avoid those rulings by a litigator's sleight of hand. The lower court did not hold that a fundraiser has the right to solicit contributions by fraudulent means, as the Attorney General suggests. Rather, it held that the State could not justify a fraud claim based upon the non-disclosure in a charitable solicitation of the net contribution proceeds received by the charity. And if it were otherwise — if the State could legitimately saddle a solicitation with a badge of fraud for failure to disclose the division of contribution proceeds — the State clearly would be circumventing the effect of this Court's rulings in the Schaumberg/Munson/Riley trilogy. Thus, the Attorney General's request that this Court "hold that fraudulent charitable solicitations — including ones based on implied misrepresentations — are unprotected speech..." (Pet. Br. 22) masks the real regulatory purpose. While the Attorney General has claimed that all he is asking is that this Court clarify prior rulings, he has really asked it to overrule the Schaumburg, Munson, and Riley holdings and decide that the rule governing charitable solicitations be changed to that governing commercial speech.

Not only has the Attorney General applied the first part of the four-part test governing commercial speech, but a variation of the second part as well, arguing that he need demonstrate only a "substantial interest" in prohibiting "fraudulent" charitable solicitations, including "half-truths and other implied assertions of verifiably false facts" (Pet. Br. 14-24), as if this were a commercial speech case. *See* Thompson v. Western States Med. Ctr., *supra*, ___ U.S. at ___, 152 L.Ed.2d at 574-75. Again, the Attorney General has urged this Court to apply a test to charitable solicitations expressly rejected by this Court in Schaumburg, as restated in Riley, having applied "exacting First Amendment scrutiny" to charitable solicitations, and having rejected the "State's argument that restraints on the relationship between the charity and the fundraiser were mere 'economic regulations' free of First Amendment implications." Riley, *supra*, 487 U.S. at 788-89.

In sum, the Attorney General is asking this Court to overrule nearly 60 years of precedent and find — for the first time in its history — that solicitations of money to support political, religious, and other like causes are no different from advertisements for the sale of pots and pans. This Court should decline this invitation, not only for the reasons stated in Schaumburg, and restated in Riley, but because of the bed-rock principle that the government has no jurisdiction over communications in the free marketplace of ideas to police it for so-called "fraudulent speech."

III. EVEN AS IT IS CHARACTERIZED BY THE ATTORNEY GENERAL, THE COMPLAINT ASSERTS UNCONSTITUTIONALLY IMPERMISSIBLE JURISDICTION OVER THE FREEDOMS OF SPEECH, PRESS, AND ASSOCIATION.

At the heart of the Attorney General's complaint is the claim that, in its regulation of charitable solicitations, the State of Illinois has jurisdiction over "not just blatant falsehoods," or "explicit falsehoods," but over "other forms of deception for pecuniary gain," including "misleading" statements and "implied misrepresentations, such as deceptive half-truths." Pet. Br. 10. In order to sustain his claims that the statements

alleged to have been made by Telemarketers were "misleading" or "deceptive half-truths," however, the Attorney General's complaint relied upon what Telemarketers did **not** say: (1) "they did not state that they were for-profit fundraisers" and (2) "they did not tell donors, that VietNow would receive at most 15 percent of the contributions raised in its name." Pet. Br. 4-5.

In order to sustain the fraud claim contained in his complaint, then, the Attorney General must establish that Telemarketers had a legal duty to disclose (1) that they were "for-profit fundraisers" and (2) "that VietNow would receive at most 15 percent of the contributions." To establish the existence of such a duty, the Attorney General alleged in his complaint that, "by taking possession of assets contributed for specific charitable purposes," Telemarketers became "trustees of those assets for the benefit of the people of Illinois, and they breached their fiduciary duty of loyalty to the people by engaging in self-dealing and devoting those assets to private purposes materially different from the specific charitable purposes for which they were donated." Pet. Br. 6. Thus, the Attorney General claimed that he was entitled to "an accounting, injunctive relief, forfeiture of compensation and the imposition of a constructive trust on the monies ... received for charitable purposes." *Id.*

Because the Attorney General's complaint contains a jurisdictional claim that threatens "activity [that] is constitutionally protected" by the First Amendment, there is a "special obligation on this Court to examine critically the basis upon which liability [is to be] imposed." NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915 (1982). Upon close examination, the Attorney General's paternalistic trust theory violates the freedoms of speech, press, and association.

A. The Complaint Rests upon a Claim of State Power that Violates the Freedoms of Speech and of the Press.

In Riley v. National Federation of the Blind, *supra,* this Court rejected "the paternalistic premise that charities' speech must be regulated for their own benefit," observing that "[t]he First Amendment mandates that we presume that speakers, not the government know best both what they want to say and how to say it." *Id.*, 487 U.S. at 790-91. In this case, the Attorney General has asserted that charities' speech must be regulated for the benefit of "people of Illinois," but that claim, like the one asserted in Riley, is no more availing. Indeed, such a claim was anticipated in Riley and resoundingly rejected:

> "The very purpose of the First Amendment is to foreclose public authority from assuming guardianship of the public mind through regulating the press, speech, and religion." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government. We perceive no reason to engraft an exception to this settled rule for charities. [*Id.* at 791.]

Additionally, the Attorney General's claim — that a for-profit fundraiser, when speaking on behalf of a charity, is compelled by a constructive trust, fictitiously creating a fiduciary responsibility to the people of Illinois to disclose the percentage of the money solicited that actually goes to the charity — was also anticipated in Riley and rejected:

> [T]he First Amendment guarantees "freedom of speech," a term necessarily comprising the decision both what to say and what *not* to say, [whether that decision] involve[s] compelled statements of opinion [or] with compelled statements of "fact": either form of compulsion burdens protected speech. [*Id.*, 487 U.S. at 796-98 (emphasis original).]

These rulings in Riley affirm the jurisdictional barrier imposed by the freedom of speech guarantee against the Attorney General's claim of plenary power over charitable solicitations because such solicitations are "inextricably intertwined ... with informative and persuasive speech," as the Illinois Supreme Court emphasized:

> The [Telemarketing] contracts with VietNow required [Telemarketers] to produce publications that "increased community awareness" about VietNow. [Telemarketers] were also directed to conduct their solicitations in a manner that would "promote goodwill" on behalf of VietNow. The fund-raising services [Telemarketers] provided, therefore, were inextricably intertwined with the advancement of VietNow's philosophy and purpose. [Ryan v. Telemarketing, *supra*, 763 N.E.2d at 298.]

As the Illinois Supreme Court pointed out, there was no allegation in the complaint that VietNow had any complaints about either the money received from Telemarketers, or the services provided it under the terms of the contract. Ryan v. Telemarketing, *supra*, 763 N.E.2d at 291. This Court has ruled that the choice of the means of communication, whether on its own or through professional agents, is for the charity to make, not the State, and that this choice is constitutionally immune

from any State interest in whether that interest rests upon the premise:

> (1) that the charitable organizations are economically unable to negotiate fair or reasonable contracts without government assistance; or (2) that charities are incapable of deciding for themselves the most effective way to exercise their First Amendment rights. [Riley, *supra*, 487 U.S. at 790.]

Just because the Attorney General limited his complaint to Telemarketers, rather than VietNow, does not allow the Attorney General to regulate indirectly what he may not regulate directly. In Meyer v. Grant, 486 U.S. 414 (1988), this Court announced that "[t]he First Amendment protects [the] right not only to advocate [one's own] cause but also to select what [one] believe[s] to be the most effective means for doing so." *Id.*, 486 U.S. at 424. The choice of means includes the payment of compensation to a third party for "[i]t is well-settled that a speaker's rights are not lost merely because compensation is received." Riley, *supra*, 487 U.S. at 801.

By the filing of this complaint, then, the Attorney General has attempted to wrest from VietNow editorial control over its own charitable solicitations, as well as its interconnected "public awareness" and "good will" campaigns. Not only is this a violation of the freedom of speech, as recognized in Riley, it violates the freedom of the press as well. In Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), this Court ruled that, no matter how strong and compelling its interest, the State may not "exercise [] editorial control and judgment" over a private publication (*id.*, 418 U.S. at 258), including its financial decisions which this Court found to be integral to the exercise of that control and judgment. *Id.*, 418 U.S. at 254-57.

By asserting that any funds in the State of Illinois for any charitable purpose are raised in trust for the "people of Illinois," and consequently that the fundraiser owes a fiduciary duty to the State, rather than to the charitable organization with which it contracted to raise the funds, the Attorney General has sought a remedy benefiting the State, rather than the charitable organization, or even the allegedly defrauded individual donors. Additionally, by his complaint, the Attorney General has sought — through requests for an accounting, injunctive relief, forfeiture of compensation and imposition of a constructive trust — a virtual take-over of Telemarketers' activities heretofore undertaken as agent for VietNow. The complaint and the relief sought constitute not only an usurpation of the speech and press rights of VietNow, but also a prior restraint upon any future solicitation/communication activities, which itself is a violation of the freedom of the press.[6] *See* Near v. Minnesota, 283 U.S. 697 (1931).

B. The Complaint Rests upon a Claim of State Power that Violates Freedom of Association.

By the filing of his complaint, the Attorney General has attempted to interpose the State not only between Telemarketers and their principal, VietNow, but also between VietNow and every individual resident in the State of Illinois. If the complaint is allowed to stand, the Attorney General would deny to VietNow and individual residents in Illinois their constitutionally-guaranteed right of association.

In FEC v. National Conservative Political Action Committee, 470 U.S. 480 (1985), this Court recognized that

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[6] The Illinois Supreme Court found an unconstitutional "chilling effect" upon speech even to allow this case to be tried because of the costs of litigation. Ryan v. Telemarketing, 763 N.E.2d at 299.

"direct mail solicitations" for money to support candidates for election to federal office was a form of association deserving full First Amendment protection, because such solicitation activity is a "mechinism [] by which large numbers of individuals of modest means can join together in organizations which serve to "amplify the voice of their adherents." *Id.*, 470 U.S. at 494. To deny full First Amendment protection to such activity, this Court observed, "would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources." *Id.*, 470 U.S. at 495.

By the attempt in his complaint to isolate Telemarketers' charitable solicitation activity, on behalf of VietNow, from Telemarketers' communicative activity, on VietNow's behalf, the Attorney General has ignored the associational rights of VietNow and Illinois residents at stake in this case. Indeed, by his claims that Telemarketers have made fraudulent statements by omitting from their appeals the disclosure of the percentage of money that will actually be received by VietNow, the Attorney General has interposed the State between VietNow and the residents of Illinois in an unconstitutional manner.

First of all, the Attorney General's complaint would "mandat[e] speech" that VietNow has not authorized its agent to make, and thus, "necessarily alters the content of the speech." *See* Riley, *supra*, 487 U.S. at 795. Therefore, the complaint, if allowed to go forward, would constitute a "content-based regulation of speech." *Id.*

Such an interposition of State power constitutes administrative censorship, depriving VietNow of its constitutional right to have each householder contacted by Telemarketers to make the decision whether or not to support VietNow's efforts on behalf of Viet Nam veterans. *Cf.*

Schneider v. State, *supra*, 308 U.S. at 161-62. Under the First Amendment's guarantee of the right of association, the State may not "substitute[] the judgment of the community for the judgment of the individual householder." Martin v. City of Struthers, *supra*, 319 U.S. at 144 (1943).

Additionally, as this Court also recognized in Martin v. Struthers, "door-to-door distributors of literature may be ... a blind for criminal activities, [but] they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion." *Id.*, 319 U.S. at 145. To allow the Attorney General to go forward with this complaint, this Court would virtually close off VietNow's, and other comparable policy organizations', telemarketing campaigns, along with direct mail — the modern counterparts to door-to-door distribution — "so essential to the poorly financed causes of little people." *Id.*, 319 U.S. at 146; Riley, *supra*, 487 U.S. at 799. The Attorney General's tactic, like the regulatory scheme struck down in Riley, would most likely put professional fundraisers in the deep freeze in Illinois, and in doing so, exclude from the state vital information on a public policy issues, thereby abridging the privileges and immunities of the United States citizens residing in Illinois. Hague v. CIO, 307 U.S. 496, 512-14 (1939).

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Illinois should be affirmed.

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FOR ARGUMENT

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IN THE

Supreme Court of the United States

THE PEOPLE OF THE STATE OF ILLINOIS
ex rel. JAMES E. RYAN, ATTORNEY GENERAL
OF THE STATE OF ILLINOIS,

Petitioner,

v.

TELEMARKETING ASSOCIATES, INC.,
RICHARD TROIA and ARMET, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF *AMICI CURIAE* PUBLIC CITIZEN, INC., AMERICAN CHARITIES FOR REASONABLE FUNDRAISING REGULATION, INC., AND 174 OTHER NONPROFIT ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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49 pp

QUESTION PRESENTED

Whether the First Amendment bars a State from pursuing an action for fraud against a professional fundraiser soliciting contributions on behalf of a charitable organization when the allegation of fraud is based solely on the fact that the fundraiser described to prospective donors the charitable purposes for which funds were being solicited without divulging the percentage of gross contributions that the charity would pay the fundraiser for its services.

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INTERESTS OF AMICI CURIAE

This brief in support of respondents is submitted by Public Citizen, Inc., American Charities for Reasonable Fundraising Regulation, Inc., and 174 other nonprofit organizations. Amici, who are listed in the Appendix to this brief, are public charities or other nonprofit organizations exempt from federal taxation pursuant to various subsections of Section 501(c) of the Internal Revenue Code.[1]

The missions and viewpoints of amici vary greatly, but all rely primarily on the public for financial support. Amici do not take a position on the telemarketing contracts at issue here, but submit this brief to express their concern about the prospect that the Attorney General of Illinois (as well as state and local regulators across the country) may be given the power to pursue a fraud action, carrying the possibility of criminal penalties or severe civil sanctions, based on nothing more than the fact that a professional solicitor described the charitable purposes for which funds were solicited without also volunteering to prospective donors the organization's supposed "fundraising costs."

Although Illinois brought this case against an outside professional fundraiser, its theory, if successful, also would allow the State to make a claim of fraud against any charity that conducts solicitations using in-house staff rather than outside fundraisers. *See Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 967 n.16 (1984). Therefore, many of the amici, who may do much of their fundraising in-house (with or without the help of consultants generally paid on a fee-for-service rather than a percentage basis) could also potentially be defendants for not disclosing what the State now contends—without any advance notice—was so excessive a

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[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity other than amici and their counsel made any monetary contribution to its preparation and submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk of the Court.

fundraising cost as to leave a "misleading impression" with donors regarding how their contributions would be spent.

The State's theory would cover not only telemarketing, the form of solicitation involved here, but all other forms of solicitation, from special events to direct mail, including solicitations prepared in-house, as is done by many amici. And if Illinois can require charities, to avoid a fraud charge, to make affirmative disclosures regarding the amount of money that they spend on fundraising, so can other states and localities. Given the considerable differences of opinion regarding how fundraising costs should be calculated, the imposition of diffuse and ill-defined state-by-state requirements for all manner of charitable solicitations could severely cripple charities' efforts to fulfill their missions.

Amici are filing this brief to alert the Court both to the dangers to all charities posed by the State's newly minted notion of fraud and to the existence of far less intrusive means, consistent with the First Amendment, of assisting donors in making informed choices about charitable giving and of protecting charitable assets from overreaching by professional fundraisers or wasting by charities.

STATEMENT OF THE CASE

1. In the aftermath of a trilogy of decisions by this Court in the 1980s extending full First Amendment protection to charitable solicitation, *Riley v. National Fed'n of the Blind of North Carolina,* 487 U.S. 781 (1988); *Secretary of State v. Joseph H. Munson Co.,* 467 U.S. 947 (1984); *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620 (1980), general appeals to the public for charitable contributions have flourished, and the public has answered the call. In the 1990s, the level of public support for charities more than doubled, from $101.4 billion in contributions in 1990 to $203.5 billion in 2000. U.S. Census Bureau, Statistical Abstract of the United States 2001, No. 561, *available at* http://www.census.gov/prod/2002pubs/01statab/socinsur.pdf.

Demand for charitable services soared to new heights after

the events of September 11, 2001. Hundreds of charitable organizations stepped up to the task, helping thousands of people directly and indirectly affected by the attacks. *See* United States General Accounting Office, *September 11: Interim Report on the Response of Charities* 2, 4 (Sept. 2002). To meet this new, as well as historical, demand, charities require funding from the public; securing that funding requires communication with the public. To raise funds, a charity must educate donors that a particular problem exists, that the charity is addressing the problem, and that the donor can help by donating funds. Henry C. Suhrke, *The Future of Fundraising,* XXXII Philanthropy Monthly, Apr. 4, 1999, at 5 ("The key ingredient to giving—and to increased giving as well—is *asking.*"). To thrive, charities require "breathing space," *NAACP v. Button,* 371 U.S. 415, 433 (1963), to experiment with innovative outreach methods, whose purpose can be as much to educate and engage the public as to raise funds. Such solicitations are often costly, combining a description of a group's charitable mission and a "call to action" urging the public to join in its cause, with a request for a donation. *See Buckley v. Valeo,* 424 U.S. 1, 19 (1976) ("[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money."). To help in these efforts, charities frequently turn to outside professional fundraisers.

Both the states and the federal government have important oversight responsibilities to ensure that charities are operated for charitable purposes and that neither charities nor those soliciting the public on their behalf (whether in-house staff, volunteers, or outside fundraisers) abuse their right to solicit charitable donations from the general public. The question presented here is whether Illinois's fraud action in this case oversteps the proper bounds of state enforcement authority and infringes the First Amendment rights of professional fundraisers and charities.

2. In this case, respondents are professional fundraisers who called individuals to solicit donations to VietNow National Headquarters ("VietNow"), pursuant to their contracts

with the charity. In the course of those exchanges, they described VietNow's charitable purposes of providing food, shelter, and financial support for Vietnam War veterans, but did not disclose that VietNow had agreed to pay them 85 percent of the gross receipts collected, a fee Illinois claims is excessive. Am. Compl. ¶ 32 (J.A. 9). The 85-percent fee covered both fundraising and programmatic expenses, as the fundraisers agreed to produce, publish, edit, and pay associated expenses for a periodic publication "to increase community awareness" of VietNow. J.A. 21, 36. Although the United States attempts to portray the State's ensuing fraud action as predicated on intentional misrepresentations, U.S. Br. 15-22, its theory diverges sharply from that upon which Illinois has litigated this case. The State does not claim that the fundraisers made intentional affirmative misrepresentations to prospective donors, but predicates its fraud action on an implied misrepresentation theory: that given the fundraisers' allegedly excessive fees, their solicitations describing the charitable purposes for which funds were sought were misleading because donors supposedly expected "much more" of their donations to be used for charitable services. *See, e.g.,* State Br. 5, 9, 12, 44; Am. Compl. ¶¶ 37-38, 67F-I, 67K-O, 74 (J.A. 10, 85-88, 104). The Illinois Supreme Court also construed this action as premised on the fundraisers' allegedly misleading omissions. 763 N.E.2d 289, 291 (2001) ("[T]here is no allegation that defendants made affirmative misstatements to potential donors.").

The Illinois trial court dismissed the State's amended complaint against the fundraisers. Relying on the *Riley/Munson/Schaumburg* trilogy of decisions addressing the regulation of charitable solicitation, both the Illinois Appellate Court and Illinois Supreme Court affirmed.

SUMMARY OF ARGUMENT

The public's confidence in the integrity and honesty of the philanthropic sector is vital to the success of charitable organizations across the country. Amici therefore do not

oppose the efforts of federal and state regulators to root out genuine fraud—indeed, they agree with the states and the United States that appropriate government regulation of charitable solicitation serves legitimate governmental interests (as well as their own) in preventing, detecting, and prosecuting fraud. Moreover, amici do not object to government regulators punishing false statements regarding how charitable contributions will be allocated (*e.g.,* solicitors informing potential donors that a specific percentage of funds will be used for charitable purposes, knowing that statement to be false). Finally, amici do not ask this Court to hold that the State has no authority to bring a fraud action unless a charity or professional fundraiser has engaged in "outright lies" or "literal falsehoods." *See* State Br. 16, 31, 39. There is no dispute that the State has the power to punish implied misrepresentations regarding verifiable facts, *see id.* at 9, 17, 23, 32, 34, including solicitations made under false pretenses.

The problem with the fraud action Illinois has pursued in this instance, however, is that the percentage of charitable contributions to be used to defray fundraising costs, which the State maintains should have been disclosed by the professional fundraisers to avoid leaving a misleading impression, is not "factual," "verifiable," or even meaningful. *See id.* at 5, 9, 12, 44 (arguing that donors expected that "much more" of their contributions would be spent on charitable purposes, without specifying *how* much more). As this Court repeatedly has recognized, fundraising cost information is of marginal, if any, relevance to an assessment of a charity's legitimacy or efficacy. Indeed, there is no consensus as to what figure best represents a fundraising cost percentage or how such a figure should be derived. The State's fraud action is thus an attempted end-run around this Court's holding in *Riley* that states may not require professional solicitors to disclose to potential donors the percentage of charitable funds to be turned over to the charity—a holding that the State discusses in its brief only as an afterthought. *See id.* at 46-48.

This case involves an after-the-fact judgment by a state

attorney general regarding when the failure to disclose a fundraising cost percentage to prospective donors constitutes fraud. As such, it represents a far more heavy-handed approach, with a far more acute risk of chilling fully protected speech by charities, than the more clearly defined (but also unwarranted) prophylactic point-of-solicitation disclosure requirement struck down in *Riley*. As the State concedes, charities and fundraisers are entitled to "fair notice" regarding speech that is proscribed or prescribed. No "authoritative judicial construction" of fraud in Illinois or elsewhere, State Br. 28, however, provides such fair warning of the point at which "fundraising costs" become so high as to render a description of a charity's charitable services misleading (on the theory that a donor would have expected "much more" of her donation to be used for such services). The multitude of imprecise formulations offered by the State, *e.g.*, State Br. i ("vast majority"), 16 ("trifling amount"), 42 ("negligible amount actually used"), 44 ("insignificant degree") highlight the dangers of the broad authority the State seeks here and the jeopardy in which it places charities and fundraisers.

This Court need not bless a fraud action of this type either to ensure that the public possesses adequate information to make wise choices about charitable giving or to preserve state and federal regulators' ability to punish and prevent genuine fraud or shut down charities that do not operate for charitable purposes. The notion that donors have little chance to learn how their donations will be used is anachronistic given the prodigious amount of financial and other information regarding charities published (and publicized) by the states themselves and by charity watchdog groups, typically on the Internet at no charge. Finally, state and federal regulators already have an ample arsenal of enforcement tools to root out real fraud in charitable appeals, whether perpetrated through self-dealing, improper diversion of funds for personal gain, or through false representations (explicit or implicit) made in charitable solicitations, and to revoke the charters or tax exemptions of those charities that do not operate for charitable purposes.

ARGUMENT

I. THIS COURT'S DECISIONS IN *SCHAUMBURG, MUNSON,* AND *RILEY* DO NOT AUTHORIZE STATES TO PURSUE INDIVIDUAL FRAUD ACTIONS BASED ON A FAILURE TO DISCLOSE FUNDRAISING COSTS TO POTENTIAL DONORS.

The State argues that this Court's decisions in *Schaumburg, Munson,* and *Riley* invite a state to proceed in an ad hoc, retrospective fashion against particular fundraisers (and, presumably, against charities) for fraud based on their failure to disclose fundraising costs to dispel an allegedly misleading impression regarding how donations will be used. State Br. 22. Not only does the State misread these decisions, but its argument betrays a lack of appreciation of the profound chilling effect on charitable speech that would result if state regulators were permitted to make subjective, post hoc decisions regarding which charitable solicitations are fraudulent for failure to divulge a "fact" that, as discussed in Part I.A., *infra,* is too elusive to be readily defined and too peripherally related to the legitimacy of a charity to merit government-compelled disclosure. If successful, Illinois's attempt to find yet another way to dictate the content of the message solicitors must convey to potential donors would serve only to hinder charities in their ability to communicate their charitable appeals and successfully raise funds, while failing to provide donors with meaningful information regarding the legitimacy or actual merit of any given charity.

A. There Is No Nexus Between High Fundraising Costs and Fraud.

1. In 1980, this Court struck down a municipal ordinance prohibiting the solicitation of contributions by charitable organizations that do not use at least 75 percent of their receipts for "charitable purposes." *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620 (1980). Although charitable appeals involve requests for funds and are

frequently conducted by for-profit professional fundraisers, the Court explained that because such appeals are "characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues," they are treated as speech fully protected by the First Amendment, rather than as commercial speech. *Id.* at 632. In *Schaumburg,* the village defended its restriction as necessary to protect the public from fraudulent solicitations, but this Court held that the State's legitimate interest in preventing fraud was only "peripherally promoted" by a direct regulation of the amount of money a charity must devote to its programmatic purposes. *Id.* at 636. The Court recognized that fundraising or administrative costs will be high for those organizations that are primarily engaged in research, advocacy, or public education, and indeed, that the costs associated with fundraising campaigns "can vary dramatically depending upon a wide range of variables, many of which are beyond the control of the organization." *Id.* at 636-37 & n.10. Accordingly, the ordinance was not a "narrowly drawn regulation[] designed to serve" the State's interests "without unnecessarily interfering with First Amendment freedoms." *Id.* at 637.

In the wake of *Schaumburg,* states became increasingly creative in their efforts to restrict the percentage of funds charities would be permitted to pay their outside fundraisers. In *Secretary of State v. Joseph H. Munson Co.,* 467 U.S. 947 (1984), and *Riley v. National Federation of the Blind of North Carolina,* 487 U.S. 781 (1988), this Court rebuffed those efforts because they were based "on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud," *Munson,* 467 U.S. at 966; *see also id.* at 961; *accord Riley,* 487 U.S. at 793, and because higher fundraising costs for a given charity may be attributable to a myriad of legitimate factors. *Riley,* 487 U.S. at 791-93; *Munson,* 467 U.S. at 961.

2. The Court's recognition in 1988 that fundraising costs bear only a tenuous relationship, at best, to the question

of fraud, *see Riley,* 487 U.S. at 793 n.7, is no less valid today. As the General Accounting Office (GAO) recently acknowledged, spending efficiency continues to vary depending upon the popularity of the cause, the age of the charity, the type of charitable activity, and sudden changes in events. Thus, expense data and related ratios provide little perspective on how well charities actually achieve their charitable purposes. United States General Accounting Office, *Tax-Exempt Organizations: Improvements Possible in Public, IRS, and State Oversight of Charities* 18-19 (Apr. 2002) ("April 2002 GAO Report").[2]

There is nothing fraudulent about this state of affairs, which is recognized by charities, professional fundraisers, and regulators alike. The Illinois Attorney General's own consumer pamphlet acknowledges that "[p]rofessional fund raisers often charge 80% to 90% of your contribution as a fee." Attorney General Jim Ryan, *Charity Fraud: Investigate Before You Donate, available at* http://www.ag.state.il.us/charitable/charity0301.pdf. Certain types of charities, such as groups that provide human services, have a particularly difficult time raising funds and accordingly have consistently high fundraising costs. A 2001 survey of the industry found that veterans groups, for instance, receive less than 17 percent of

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[2] An institution such as a university or hospital, for example, is likely to have an established donor base and a wide range of fundraising options and, accordingly, a relatively low fundraising cost ratio. By contrast, newer organizations undertaking costly campaigns to increase their donor base are likely to have relatively high fundraising cost percentages, such as 80 or 90 percent, or even in excess of 100 percent. Bruce R. Hopkins, *The Law of Fundraising* 90 (3d ed. 2002); *see also id.* at 103-04, 362-63. Donor-acquisition mailings cost more money than they earn in the short-term, as much as $1.25 to $1.50 to raise $1.00, though they hold out the potential for long-term gains if new donors give substantial additional funds in subsequent years. Telemarketing is an even more expensive, though often more successful, fundraising technique. James M. Greenfield, *The Nonprofit Handbook: Fund Raising* 259, 321 (2d ed. 1997); *see also* Hopkins, *supra,* at 24-25, 31, 100.

the funds collected by professional solicitors—less than any other type of charity. Harvy Lipman, *Calling Solicitors to Account,* XIII Chron. of Philanthropy, Apr. 5, 2001, at 1, 24. As the survey notes, a fundraiser that returns a low percentage of collections to charity has not necessarily acted improperly, as the percentage may simply reflect the size and type of its charity clients. *Id.* at 24.

Not only are fundraising cost percentages poor indicators either of fraud or a charity's intrinsic merit, but there is no readily ascertainable fundraising percentage or expense figure available that would constitute a material or verifiable "fact" that must be disclosed to potential donors. *See* Hopkins, *supra,* at 89-91 (explaining reasons for absence of agreed-upon base or universal standard for computing fundraising costs or percentages). As the GAO recently acknowledged, charities have considerable discretion in determining how to allocate expenses among the program services, management, and fundraising categories, differences that can affect comparisons across charities. Neither the IRS nor professional accounting accrediting bodies require or prohibit particular allocation methods, so long as they are reasonable and consistently applied. April 2002 GAO Report at 2, 8, 13, 16-19; *see also* Hopkins, *supra,* at 105 & n.29. Two organizations may have identical fundraising expenses and yet derive different fundraising cost ratios. This fact does not illustrate fraud, but the lack of uniformity in, and intrinsic malleability of, fundraising cost allocation methods.[3]

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[3] Moreover, had the same activities, with the same fundraising expenses, been conducted by VietNow entirely in-house, there would have been no "percentage" in a fundraising contract for Illinois to point to as "excessive" or to contend the charity must disclose to potential donors to dispel any misleading impression. Yet there would be no economic difference in terms of the group's solicitation costs or amounts expended for charitable services. *See Riley,* 487 U.S. at 799 (criticizing disclosure requirement's discrimination between those charities who must rely on professional fundraisers and those that conduct their campaigns in-house). The susceptibility of a fundraiser or charity to prosecution for fraud cannot be

The State's effort, in other words, to force charities or fundraisers to attempt to describe fundraising costs to potential donors as a single percentage not only is not "a meaningful indicator of anything," but, even worse, "may be so misleading as to be counterproductive to the disclosure motive and unfair to certain categories of charitable groups." Hopkins, *supra,* at 90; *see also* April 2002 GAO Report at 16. An in-house or outside solicitor's silence on the issue of fundraising expenses simply is not an implied misrepresentation of fact. Even apart from the legitimate variation of fundraising costs among charities, the states' insistence on making charitable spending efficiency the lodestar of their regulatory approach is fundamentally misguided. Cost of fundraising measures, however calculated, are of marginal, if any, utility to the potential donor attempting to ascertain the actual efficacy or accomplishments of a charity soliciting donations. *Id.* at 19.

In short, any effort by the government to punish charitable appeals or to compel crippling, but meaningless, disclosures to potential donors on the ground that the charity's fundraising costs or the professional fundraiser's fees are "higher than expected," both ignores the First Amendment value of these appeals and discriminates against new, small, or unpopular charities and those that combine education and solicitation.

B. *Riley's* Rationale in Barring States from Compelling Before-the-Fact Disclosures of Fundraising Cost Percentages Applies as Surely to an After-the-Fact Disclosure Requirement.

Illinois insists that regardless of whether the professional fundraisers' fee here can be labeled fraudulent in and of itself, the fundraisers' failure to disclose that fee to prospective donors on the spot renders the solicitations fraudulently misleading because the fundraisers described to donors the charitable purposes for which funds were being solicited without also revealing their (allegedly high) fee. To avoid

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permitted to turn on such an artificial distinction.

leaving a false or misleading impression that "much more" than a "trifling," "negligible," or "insignificant" amount of donated funds would be used to further VietNow's charitable purposes, State Br. 5, 9, 12, 16, 42, 44, the State contends that the fundraisers were required either to refrain from describing the charitable purposes for which funds were solicited or to disclose their fee. State's Br. 46, 48.

The first alternative, that fundraisers refrain from disclosing the charitable purposes for which donations are sought, is not an option. Indeed, Illinois law explicitly provides that a person soliciting contributions must disclose the primary program service for which funds will be spent. 225 Ill. Comp. Stat. 460/18(b). The only other alternative to avoid the risk of a fraud action, then, is for charities and fundraisers to make an affirmative disclosure of fundraising costs in any case in which the fee is higher than *some* donor might expect. But the State cannot compel such speech. *Riley,* 487 U.S. at 795 ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech."); *see also Hurley v. Irish-American Gay, Lesbian & Bisexual Group,* 515 U.S. 557, 573 (1995) (the right of the speaker to choose "what not to say" applies "equally to statements of fact the speaker would rather avoid"); *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 348-49 (1995). Although *Riley* addressed a prophylactic disclosure requirement, its rationale applies as surely to one based on a post hoc judgment by a State that the magnitude of fundraising costs rendered a description of the charitable purposes for which funds were sought a deceptive "half truth."

1. Just as Illinois argues here, North Carolina maintained in *Riley* that a blanket disclosure to all potential donors of the percentage of receipts turned over to charity was necessary "to dispel the alleged misperception that the money they give to professional fundraisers goes in greater-than-actual proportion to benefit charity." 487 U.S. at 798. The Court rejected the proposed disclosure requirement as a content-based regulation of speech, *id.* at 795, for several reasons all fully applicable in this case.

First, the Court reasoned, North Carolina's disclosure requirement incorrectly presumed that the charity derived no benefit from funds collected but not turned over to it. As the Court had made clear in *Schaumburg* and *Munson,* "where the solicitation is combined with the advocacy and dissemination of information, the charity reaps a substantial benefit from the act of solicitation itself." *Riley,* 487 U.S. at 798. For some charities, a substantial aspect of their programmatic purpose *is* to broadly communicate a particular message. Amicus MADD's mission, for instance, is to communicate the message "Don't Drink and Drive." For such groups, "a significant portion of the fundraiser's 'fee' may well go toward achieving the charity's objectives even though it is not remitted to the charity in cash." *Id.* at 798-99 (citations omitted); *e.g.,* Gary Ellis, *Making a Connection: DialAmerica Helps Raise Awareness and Funds for MADD's Mission,* DRIVEN Magazine, at 23 (Fall 2002) (DialAmerica telemarketers "reach millions of people a year, and each call educates the public about the tragedy of drunk driving, provides statistics and asks the customer to always designate a sober driver"), *available at* http://www.madd.org/news/0,1056,5616,00.html.

Here Illinois has ignored the First Amendment value inherent in the solicitations the professional fundraisers conducted on VietNow's behalf, attaching significance only to the 85 percent figure in the contract without regard to how that fee was spent and whether a portion of the fee was used for programmatic purposes. As Judge Posner explained in rejecting the IRS's revocation of the tax exemption of a charity that paid its professional fundraiser $26-plus million of the $28-plus million in charitable funds it had raised: "These figures are deceptive, because UCC got a charitable 'bang' from the mailings themselves, which contained educational materials . . . in direct support of the charity's central charitable goal. A charity whose entire goal was to publish educational materials would spend all or most of its revenues on publishing, but this would be in support rather than in derogation of its charitable purposes." *United Cancer Council*

v. Commissioner, 165 F.3d 1173, 1178 (7th Cir. 1999). Moreover, it is wrong for Illinois to suggest, absent an actual diversion of charitable funds or violation of the terms of the fundraising contracts, that the professional fundraisers in this or similar instances "kept" for themselves a certain percentage of charitable collections—as if to imply that the fee represents pure profit. Henry C. Suhrke, *What Can Be Done About Fund Raising "Fraud"?*, XXVI Philanthropy Monthly, July/Aug. 1993, at 11; *see, e.g.*, State Br. 2, 3, 9, 45. Fundraising, especially telemarketing, is expensive, often requiring the outlay of hundreds of thousands of dollars to buy telephone equipment, hire solicitors to make calls, pay phone bills, send out follow-up mail to donors, and handle donation checks. Lipman, XIII Chron. of Philanthropy, *supra*, at 24, 27.

Second, the *Riley* Court noted that an unchallenged portion of North Carolina's disclosure law required professional fundraisers to disclose their professional status to potential donors, "thereby giving notice that at least a portion of the money contributed will be retained." *Riley*, 487 U.S. at 799 & n.11. The Court also recognized that donors are "undoubtedly aware that solicitations incur costs, to which part of their donation might apply." *Id.* at 799. Illinois likewise requires that professional fundraisers inform prospective donors that the solicitation is being made "by a paid professional fund raiser" and "that contracts and reports regarding the charity are on file with the Illinois Attorney General." *See* 225 Ill. Comp. Stat. 460/17(a). There is no reason that these disclosure requirements are insufficient to put potential donors on notice that part of their donation will be used to defray the solicitor's expenses.[4] Although both Illinois and the United States assert

[4] Amici do not object to Illinois's requirement that fundraisers disclose their paid professional status. Such a "brief, bland, and non-pejorative disclosure" is unobjectionable because, unlike a fundraising percentage disclosure requirement, it is "unlikely to discourage donations." *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225, 1232 (4th Cir. 1989); *see also Indiana Voluntary Firemen's Ass'n v. Pearson*, 700 F. Supp. 421, 441-42 (S.D. Ind. 1988).

that the amended complaint alleges that the fundraisers failed to disclose their paid professional status here, *see* State Br. 4; U.S. Br. 16, the complaint in fact makes no such claim, *see* ¶ 37 (J.A. 10); nor, unsurprisingly, did the Illinois courts understand the Attorney General to assert such a claim.

Under the State's theory, then, a general solicitation that describes the charitable purposes to which funds will be used is "misleading" not because the solicitor has falsely implied a verifiable *fact*, but rather because the Attorney General has made a subjective judgment that the fundraiser's fee is "higher" than a donor might have expected. As the *Riley* Court pointed out, however, a donor is always "free to inquire how much of the contribution will be turned over to the charity." In fact, the Court emphasized, North Carolina law (like the Illinois statute, 225 Ill. Comp. Stat. 460/17(b)) required the disclosure of such information *upon request* by the donor. 487 U.S. at 799; *see, e.g., Famine Relief Fund v. West Virginia*, 905 F.2d 747, 751-52 (4th Cir. 1990) (sustaining disclosure-upon-request requirement). Even without such a requirement, the potential donor who is refused an answer is not likely to donate. *Riley*, 487 U.S. at 799. Such disclosure-on-demand statutes are far less objectionable because specific requests for information from potential contributors provide a context for the solicitor (or in-house staff or volunteer) to make fundraising expense information understandable to a listener who presumably (because she asked the question) is willing to attend to the answer. *Cf. Ibanez v. Florida Dep't of Bus. & Prof'l Reg'n*, 512 U.S. 136, 145 n.9 (1994) (attorney advertisement of credentials not misleading in part because consumers could call the board to verify the credentials and state bar rules required the provision of written information describing the attorney's expertise "to anyone who so inquires"). The State has not alleged that the professional fundraisers refused to answer candidly such informational requests here.

Finally, the Court in *Riley* rejected the fundraising

percentage disclosure requirement for the simple reason that it "will almost certainly hamper the legitimate efforts of professional fundraisers to raise money for the charities they represent." 487 U.S. at 799. Not only would such a requirement discriminate against new, expanding, or unpopular charities that rely on professional fundraisers and conduct costly campaigns, but "in the context of a verbal solicitation, if the potential donor is unhappy with the disclosed percentage, the fundraiser will not likely be given a chance to explain the figure; the disclosure will be the last words spoken as the donor closes the door or hangs up the phone." *Id.* at 799-800. In short, the Court concluded: "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Id.* at 790-91.

A charitable solicitation, particularly by telephone, is made in a brief exchange with a prospective donor. A premium is placed on the solicitor's ability to convey effectively and persuasively the importance of the charity's mission and the need for that potential donor's involvement and financial support, and to put to rest any reservations regarding the track record of the organization or the popularity of its cause. In short, it is a delicate and fleeting exchange. Similar concerns arise for direct mail, as that mail competes with every other piece of mail for the recipient's limited attention. Any government-compelled disclosure, other than the most basic facts regarding the identity of the charity, the nature of its mission, and, in the case of telemarketing, the status of the caller, threatens the success of that exchange, hampering charities' protected speech and chilling the free flow of information in the future. *See Texas State Troopers Ass'n v. Morales,* 10 F. Supp. 2d 628, 634-35 (N.D. Tex. 1998). ("[T]elephone solicitors have a limited and time sensitive window of opportunity during which to communicate their message. Mandating that the solicitors disclose [percentage] information at the beginning of the phone call would certainly inhibit the solicitors' ability to effectively seek contributions and, consequently, would impede the solicitation.").

2. Although the *Riley* Court reaffirmed that a State "may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements," 487 U.S. at 800; *see also Munson,* 467 U.S. at 961 n.9; *Schaumburg,* 444 U.S. at 636-37, the Court plainly did not mean to imply that regulators could bring fraud actions against fundraisers or charities for failing to make a disclosure that the Court had just explained was not required to render a solicitation non-misleading. *See Riley,* 487 U.S. at 798-801. Indeed, the Court clarified that it would "not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's travel budget." Although "the foregoing factual information might be relevant to the listener, and in the latter case, *could encourage or discourage the listener from making a political donation,*" a law compelling its disclosure would "clearly and substantially burden the protected speech." *Id.* at 798 (emphasis added).

A fundraiser's failure to disclose a fundraising cost percentage in a particular case where a state attorney general has deemed the cost especially high is no different from these other types of potentially discouraging disclosures that the *Riley* Court denied the states the power to compel. Such compulsion would impose an even more significant burden on protected speech here because, as explained above, fundraising cost percentages have no independent informational significance, and there is no readily ascertainable or verifiable "fact" to disclose. Charities and fundraisers alike would be left wondering which disclosures they must make up front to prospective donors to avoid the risk of a fraud action by state regulators afterward. The specter of such enforcement action whenever a charity or fundraiser has failed to disclose fundraising costs that a state deems to be "excessive," "blankets with uncertainty whatever may be said," compelling "the speaker to hedge and trim" its speech. *Thomas v. Collins,*

323 U.S. 516, 535 (1945). The only other choice is for a charity or fundraiser to make elaborate, distracting, and potentially unappealing fundraising cost revelations in *all* communications with potential donors to avoid the possibility of losing the right to speak at all. Either course of action is sure to inhibit charities' efforts to build public support for their missions.[5]

C. Imposing Such a Requirement After the Fact on a Case-by-Case Basis Presents an Even Greater Risk to Charities' Protected Speech Than a Prophylactic Disclosure Requirement.

The State contends, however, that the *Schaumburg/Munson/Riley* trilogy is irrelevant to its ability to bring an individual fraud action in this case because Illinois has attempted neither to regulate the size of the professional fundraisers' fee nor to mandate any particular point-of-solicitation disclosure that must be made in all cases. Instead, it argues, a case-by-case approach is less intrusive because it permits the State to evaluate in retrospect whether a fraud on potential donors has occurred and to tailor its regulatory approach to the particular facts. State Br. 12, 23-24, 48. The Illinois Supreme Court was right to reject this disingenuous effort to distinguish *Riley* and its predecessors. 763 N.E.2d at 297. To be sure, a failure to disclose can constitute fraud in some situations, but what is particularly striking about the State's lengthy discussion of fraud principles here is that it fails to cite even a single fraud case in which the facts remotely resemble these, let alone one where fully protected speech was

[5] This does not mean, however, that fundraising cost information should be "categorically" barred as *evidence* in a fraud case brought against a charity or a fundraiser or that fundraising costs are "irrelevant" to a fraud action based on other indicia of fraud, as the State claims the Illinois Supreme Court ruled. *See* State Br. i, 11, 43, 44. The court below simply held that a fraud action may not be predicated *on nothing more than* a solicitor's failure to divulge fundraising costs at the point of solicitation.

at issue. The blunt hammer of a fraud action for failure to disclose fundraising fees when they are higher than some real or hypothesized individual might expect is no more "narrowly tailored" or able to survive "exacting First Amendment scrutiny," *Riley*, 487 U.S. at 789, than a disclosure requirement that applies to all solicitations.

1. As an initial matter, it is important to dispel the myth that *Riley* is inapposite because the State does not propose to compel any particular disclosures up front, but merely wishes the option of prosecuting false or misleading statements after they are made. State Br. 46; U.S. Br. 9, 24. There is nothing about the alleged exchanges between the fundraisers here and potential donors that takes them outside of the prototypical exchange contemplated by this Court in *Riley*, in which a professional fundraiser identifies the charitable purposes for which funds are solicited, but does not volunteer the proportion that will go toward paying the fundraiser's fee (of which a substantial portion is expended to fulfill the fundraiser's obligations to the charity). While amici do not dispute the authority of state and federal regulators aggressively to pursue actual fraud committed by fundraisers or charities, the use of suggestive or inflammatory terms such as "deception," "half truths," "deceit for pecuniary gain," and "ingenious swindlers," State Br. 9, 11, 29, 39, cannot convert this case into something other than what it is: a fraud action premised on the fundraisers' failure to disclose voluntarily to potential donors the terms of their contract with VietNow.

Far from a saving grace, the State's claimed discretion to decide, without notice or fair warning, when to bring a fraud action for failure to make a disclosure that this Court previously held the states could not compel, renders this type of enforcement activity far worse, from the standpoint of safeguarding First Amendment freedoms, than the categorical disclosure requirement struck down in *Riley*. The discretion Illinois seeks to exercise here is no different, in effect, from the "waiver" provision this Court rejected in *Munson*. The Maryland law invalidated in that case prohibited charities from

paying or agreeing to pay more than 25 percent of the amount raised, but provided for an administrative waiver for a charity that could demonstrate financial necessity. The Court ruled that this added flexibility did not save the statute because Maryland's waiver authority was tantamount to a "license" for the dissemination of ideas and hence "inherently suspect." 467 U.S. at 964 n.12; *cf. Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969) ("[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional."). As the Court aptly concluded, charities whose First Amendment rights are abridged by the fundraising limitation "simply would have traded a direct prohibition on their activity for a licensing scheme that, if it is available to them at all, is available only at the unguided discretion of the Secretary of State." 967 U.S. at 964 n.12; *see also Riley*, 487 U.S. at 793-94; *Schaumburg*, 444 U.S. at 643 n.1 (Rehnquist, J., dissenting).

As the court below recognized, Illinois's fraud action is no "less intrusive" because it is an instance of individual litigation. 763 N.E.2d at 297. The post-solicitation approach invites significantly more self-censorship because all fundraisers in the State "would have the burden of defending the reasonableness of their fees, on a case-by-case basis, whenever in the Attorney General's judgment the public was being deceived about the charitable nature of a fund-raising campaign because the fund-raiser's fee was too high." *Id.* at 299. As a result, fundraisers (and charities, as well) "would be at constant risk of incurring litigation costs, as well as civil and criminal penalties, which could produce a substantial chilling effect on protected speech, based on nothing more than a 'loose inference that the fee might be too high.'" *Id.* (quoting *Riley*, 487 U.S. at 793). And although Illinois disclaims any intent to regulate the size of the fees charged by fundraisers, *see* State Br. 11, 24 n.21, 41, a fundraiser's obligation to divulge its fee would be triggered only when that fee was higher than a donor might expect, a determination to be made at the discretion of state officials who

might be serving their own political interests in making such a determination. The State's fraud action, then, would have the effect either of capping fundraising costs at whatever level regulators decided was excessive, or driving fundraisers out of a jurisdiction altogether to avoid making undesirable and even misleading disclosures to potential contributors.

2. Further compounding the burden placed on charities and fundraisers from fraud actions pursued on an "ad hoc and subjective basis" by state regulators, *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972), is the intractable difficulty that charities would face in being denied "fair warning as to what is prohibited." *Id.* at 114. "All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). Still "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech." *Smith v. California*, 361 U.S. 147, 151 (1959); *accord Baggett v. Bullitt*, 377 U.S. 360, 372 & n.10 (1964). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Button*, 371 U.S. at 433. Such specificity is completely lacking here: If this fraud action is permitted to proceed, charities and fundraisers will be left to guess which representations they may make without risk and which disclosures they *must* make to avoid criminal penalties, loss of charitable solicitation licenses, and other sanctions.

Conceding that charities and fundraisers must be provided "fair notice" of what is proscribed before the State may bring an action for fraud against them, State Br. 28, the State finds that requirement satisfied here because there is a well-developed law of misrepresentation, State Br. 28-30—in other words, solicitors are on notice of their obligation not to commit fraud. Yet there is no "authoritative judicial construction," State Br. 28, of the principles of implied misrepresentation that would suggest that this kind of case is susceptible to a fraud

claim.[6] The real-life scenarios in which charities and fundraisers would be left to speculate, at their peril, about their legal obligations are legion:

- Suppose a charity agreed to pay a professional fundraiser 85% of funds received for a risky and expensive telemarketing campaign aimed at increasing the charity's donor base, but, over a several-year period, the charity devoted more than 50% of its overall contributions to its charitable services. Would it be misleading in that instance for the charity or fundraiser to fail to disclose the 85% contract to potential donors?
- Suppose a charity spent 85% of funds received from a particular campaign on fundraising costs, but all fundraising was conducted entirely in-house. If the charity's staff described its charitable purposes in its solicitations, but did not disclose its fundraising expenses to potential donors, would the charity be guilty of fraud?
- Imagine the converse situation, in which a fundraising contract provided that the charity would receive *more* than half of the gross proceeds in a particular fundraising drive, but *overall* the charity spent only 15% of funds received on its charitable purposes. Would the charity or fundraiser have to disclose the charity's overall fundraising costs to donors solicited in that fundraising drive?
- What is the relevant time-frame for determining whether a solicitation left a false impression regarding how funds

[6] The lower courts' treatment of state statutes that expressly *stated* the principle upon which Illinois relies here—that at a specified fundraising percentage level, it is a misrepresentation of fact for a solicitor to represent to potential donors that funds will go to charitable purposes without divulging the fundraising cost percentage—is instructive. In each case, the courts struck the statutes down. *See, e.g., Texas State Troopers*, 10 F. Supp. 2d 628; *Kentucky State Police Professional Ass'n v. Gorman*, 870 F. Supp. 166 (E.D. Ky. 1994); *People v. French*, 762 P.2d 1369 (Colo. 1988) (en banc); *State v. Events Int'l, Inc.*, 528 A.2d 458 (Me. 1987).

would be used? Should regulators focus on the alleged misrepresentations or omissions made regarding the fundraising costs involved in a particular campaign or under a specific contract, or, instead, should they focus on the charity's *overall* allocation of funds between fundraising and charitable expenses?

- Many of the amici enter into fundraising contracts, such as fee-for-service agreements, that do *not* specify a percentage payment to the fundraiser or return to the charity. Will a charity or its fundraiser be held accountable after the fact by state or local regulators, who can review the charities' IRS Form 990s, if it turns out that a particular campaign—or, indeed, their fundraising effort for the entire year—has been a financial failure, yielding little to no return to the charity?

All charities incur high fundraising costs at some point. The State offers no objective standard to govern when a charity must qualify its description of its program services or reveal fundraising costs to potential donors to avert a potential fraud action. Under the State's approach, virtually any statement a solicitor might make in a solicitation could be viewed as potentially misleading if not accompanied by a disclosure of fundraising costs.

Without "explicit standards" governing when a fraud action may be brought based on an omission of fundraising cost information in a solicitation, it is left to the whim of the state or local regulator to determine whether to target particular charities or fundraisers for political or public relations gains or to discriminate against those groups that have taken positions in opposition to regulators in a particular state. The very threat of such selective enforcement raises serious First Amendment concerns. *See, e.g., Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991) (invalidating attorney disciplinary rule that was "so imprecise that discriminatory enforcement [was] a real possibility"); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (standardless local vagrancy ordinance

furnished "a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure'") (quoting *Thornhill v. Alabama,* 310 U.S. 88, 97-98 (1940)); *see also City of Houston v. Hill,* 482 U.S. 451, 465 & n.15 (1987); *Kolender v. Lawson,* 461 U.S. 352, 357-61 (1983); *Hynes v. Mayor of Oradell,* 425 U.S. 610, 622 (1976).

The conclusion is inescapable that the "substantial imprecisions" of applying a common-law theory of fraud to the failure to reveal fundraising cost information to potential donors "will chill speech." *Hill v. Colorado,* 530 U.S. 703, 772 (2000) (Kennedy, J., dissenting); *Button,* 371 U.S. at 438 ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."). The end result, if Illinois prevails, will be to inhibit charitable solicitations and reduce the total quantity of protected speech. *See Schaumburg,* 444 U.S. at 632 (without solicitation, "the flow of . . . information and advocacy would likely cease"); *Meyer v. Grant,* 486 U.S. 414, 423 (1988) (prohibition against use of paid petition circulators had "the inevitable effect of reducing the total quantum of speech on a public issue").

II. FACILITATING PUBLIC ACCESS TO INFORMATION REGARDING CHARITIES, COUPLED WITH EXISTING ENFORCEMENT REMEDIES, PROVIDES MORE EFFECTIVE AND CONSTITUTIONAL MEANS OF ADDRESSING ABUSIVE CHARITABLE SOLICITATIONS.

A. The State argues that donors have little opportunity to learn how their contributions will be used, *see* State Br. 10-11, 36, and that, therefore, states must protect consumers from rapacious fundraisers by compelling, in certain instances, affirmative disclosures to donors regarding fundraising costs. If that were ever true, the notion is antiquated today, given the extensive financial information regarding charities and professional fundraisers that is reported to, made accessible to the public by, and frequently published by the states.

Extensive information regarding charities is widely disseminated, usually at no charge on the Internet, by the states, charity watchdog groups, charities themselves, and others.

This Court has invited the states to require charities and fundraisers to submit financial information as part of their state filings and to publish that information to educate the public. *See, e.g., Riley,* 487 U.S. at 795, 800; *Schaumburg,* 444 U.S. at 637-38. Many lower courts have followed that lead, rejecting regulations of charitable solicitations—many of them compelled point-of-solicitation disclosures—because state publication of the same information would be at least as effective without offending the First Amendment. *See, e.g., Texas State Troopers,* 10 F. Supp. 2d at 634; *National Fed'n of the Blind of Colorado v. Norton,* 981 F. Supp. 1371, 1374 (D. Colo. 1997); *Gorman,* 870 F. Supp. at 169; *Pearson,* 700 F. Supp. at 443-44.

The states have accepted the courts' invitation. Forty of them, including Illinois, and the District of Columbia (in addition to many local governments) have adopted charitable solicitation acts that require charities and fundraisers soliciting contributions in their jurisdictions to register and submit financial information. *See, e.g.,* 225 Ill. Comp. Stat. 460/2, 460/4 (registration and annual reporting requirements for charities); *id.* 460/6, 460/6.5, 460/8 (registration, annual reporting requirements, and contract requirements for professional fundraisers). Charities and professional fundraisers alike are required to file copies of their fundraising contracts with the Illinois Attorney General. *Id.* 460/2(a)(10); *id.* 460/7(a). All of this extensive information is open to public inspection, *id.* 460/2(f), and the Attorney General is authorized to publish an annual report on charities, including the amount of money and percentage of collections spent on program services. *Id.* 460/9(i); *see* http://www.ag.state.il.us/charitable/

charitydb.html (future Illinois charity database).[7] States, including Illinois, often publish guides for the general public on charitable giving. *E.g., Tips for Informed Charitable Giving, available at* http://www.ag.state.il.us/charitable/charitygive.htm. In addition, the Internal Revenue Code requires nonprofits to provide copies of their annual tax filings, the IRS Form 990s, to the public upon request. 26 U.S.C. § 6104(d). Charities often post these forms on their websites, *see, e.g.,* http://www.citizen.org/about/articles.cfm?ID=5165 (amicus Public Citizen's Form 990s), along with other information about their missions and accomplishments.

In addition to information made publicly available by the states and charities themselves, considerable information regarding charities is disseminated by third parties. GuideStar, a national database of nonprofit organizations, provides information on 850,000 nonprofits nationwide, including their IRS Form 990s. *See* www.guidestar.org. Numerous charity watchdog groups provide fundraising percentage information or prepare reports evaluating or rating charities according to varied criteria.[8] The trade press provides similar information. *See, e.g.,* Lipman, XIII Chron. of Philanthropy, *supra* (analysis of nonprofit groups and professional fundraising fees). Offering such information to the donating public through

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[7] Numerous states publish such information. *See, e.g.,* http://justice.hdcdojnet.state.ca.us/charitysr/default.asp (California charities database search); Florida Gift Givers' Guide: A Guide to Charitable Giving in Florida (2002-2003), *available at* http://www.800helpfla.com/~cs/gift_givers/search.html; New York State Department of Law, Charities Bureau, *Pennies for Charity: Where Your Money Goes* (Dec. 2002), *available at* http://www.oag.state.ny.us/charities/pennies02/penintro.html; http://www.secstate.wa.gov/ charities/search.aspx (Washington database for charities and commercial fundraisers).

[8] *See, e.g.,* Better Business Bureau Wise Giving Alliance (www.give.org/reports/index.asp); Charity Navigator (www.charitynavigator.org); American Institute of Philanthropy (www.charitywatch.org); Charitable Choices (www.charitychoices.com); Minnesota Charity Review Council (www.crcmn.org); National Crime Prevention Council (www.ncpc.org).

multiple channels not only respects First Amendment values, but is likely to be a more effective means of ensuring that potential donors have at their fingertips the information that *they* believe to be most important in deciding whether to make a charitable contribution. *See Riley,* 487 U.S. at 804 (Scalia, J., concurring) ("[W]here the dissemination of ideas is concerned, it is safer to assume that the people are smart enough to get the information they need than to assume that the government is wise or impartial enough to make the judgment for them.").

B. This emphasis on publication of information regarding charities is not meant to suggest that amici believe that there is no place for fraud actions or other enforcement activities by federal or state regulators seeking to shut down charities or fundraisers engaged in abusive solicitation practices or to force them to comply with legal obligations. The enforcement tools available to federal and state regulators that do not compel speech of the government's choosing, however, are already adequate for the task.

As noted above, the great majority of states regulate charities and fundraisers soliciting in their jurisdictions. The states have successfully enjoined solicitations by, and have even dissolved, or revoked the charitable charters of, those charities that have refused to register or satisfy annual reporting requirements.[9] State regulators likewise have been unhindered in their efforts to root out real fraud in charitable appeals, whether that fraud is perpetrated through the improper diversion of funds for personal benefit or through false representations (explicit or implicit) made in solicitations themselves. *See, e.g., People v. Knippenberg,* 757 N.E.2d 667 (Ill. App. Ct. 2001) (affirming fundraiser's criminal convictions for theft and for using charitable contributions for his own personal benefit); *People v. Caldwell,* 290 N.E.2d 279

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[9] *See, e.g., Brattman v. Secretary of the Commonwealth,* 658 N.E.2d 159 (1995) (Mass. 1995); *People ex rel. Abrams v. Westchester County,* 604 N.Y.S.2d 579 (N.Y. App. Div. 1993); *Abrams v. New York Found'n for the Homeless, Inc.,* 148 Misc. 2d 791 (N.Y. Sup. Ct. 1990).

(Ill. App. Ct. 1972) (affirming conviction of organizer of charity art auction for unauthorized use of a person's name to promote the auction).[10] The array of existing criminal and civil sanctions gives the states considerable leverage over charities and professional fundraisers to negotiate settlements barring offending persons from further solicitation activities within their jurisdictions.[11] And states long have possessed the authority at common law (as well as by statute) to supervise the administration of assets given for charitable purposes. *See* State Br. 39 n.30; *e.g., Summers v. Cherokee Children & Family Servs., Inc.*, 2002 WL 31126636 (Tenn. Ct. App. 2002) (upholding dissolution of two nonprofits that had abandoned their charitable purposes and been used for private gain). This responsibility includes the legitimate authority to ensure that charitable assets are not grossly mismanaged or wasted—so long as the State provides advance notice through statutes, regulations, or authoritative judicial constructions regarding the circumstances in which it will intervene to preserve those assets, revoke a charitable charter, or dissolve the corporation.

Furthermore, the states do not act alone in this endeavor. The federal government has several enforcement options at its disposal as well. Federal fraud law applies to charitable solicitations made through the mail or by telephone. *See* 18 U.S.C. §§ 1341, 1343; *e.g., United States v. Ciccone*, 219 F.3d

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[10] *See also People v. Orange County Charitable Servs.*, 73 Cal. App. 4th 1054 (Cal. Ct. App. 1999); *Marcus v. Jewish National Fund*, 557 N.Y.S.2d 886 (N.Y. App. Div. 1990); *Commonwealth ex rel. Preate v. Pennsylvania Chiefs of Police Ass'n*, 572 A.2d 256 (Pa. Commw. Ct. 1990); *Strope v. Commonwealth*, 2000 WL 389452 (Va. Ct. App. 2000).

[11] *See, e.g.*, Press Release, *Settlement with United Children's Fund Permanently Bars Charity From Operating in New York* (Apr. 2, 2001), *available at* http://www.oag.state.ny.us/press/2001/apr/apr02a_01.html (misrepresentation of percentage of fundraising actually supporting charitable purpose); Press Release, *Charity Scam Highlights Need for Scrutiny in Making Donations* (Dec. 12, 2000), *available at* http://www.oag.state.ny.us/press/2000/dec/dec12a_00.html (failure to forward charitable contributions to the charity).

1078 (9th Cir. 2000); *United States v. Hawkey*, 148 F.3d 920 (8th Cir. 1998). The FTC has successfully obtained injunctive and monetary relief against telemarketers that have engaged in deceptive fundraising practices, *see, e.g., FTC v. NCH, Inc.*, 1995 WL 623260 (D. Nev. 1995), *aff'd*, 106 F.3d 407 (9th Cir. 1997), authority that Congress has recently expanded. *See* USA Patriot Act of 2001, Pub. L. No. 107-56, § 1011 (Oct. 26, 2001); *see also* 16 C.F.R. 310.3(d) & 310.4(e) (Dec. 2002); U.S. Br. 1-2. Research has uncovered no case, however, in which either a state or the federal government has successfully brought a fraud action against a charity or fundraiser for the failure to disclose fundraising costs to potential donors because fundraising costs were higher, or the percentage of funds used for charitable purposes was lower, than a donor might have expected, absent a false statement.

Finally, the IRS has considerable oversight authority over tax-exempt organizations, with both its long-established power to revoke a charity's tax exemption and its newer authority, conferred by Congress in 1996, to impose intermediate sanctions, in the form of substantial excise taxes, on "excess benefit transactions." *See* 26 U.S.C. § 4958; 26 C.F.R. Parts 53, 301 & 602 (2002) (implementing regulations). To maintain their tax-exempt status, charities must, among various requirements, be operated (1) so they do not cause any inurement of their net earnings to the benefit of private individuals, primarily insiders, who maintain a special relationship to the charity, 26 U.S.C. § 501(c)(3) & (c)(4)(B); 26 C.F.R. § 1.501(c)(3)-1(c)(2) (2002); and (2) so they do not confer any other impermissible private benefit, such as when the charity is not organized and operated primarily for the advancement of charitable purposes. 26 C.F.R. § 1.501(c)(3)-1(a)(1) (2002). *See generally* Hopkins, *supra*, at 272-79; Bruce R. Hopkins & D. Benson Tesdahl, *Intermediate Sanctions: Curbing Nonprofit Abuse* 52-59 (1997).

Thus, charities that pay excessive or otherwise unreasonable compensation for services, or engage in self-dealing or related-party transactions that primarily benefit

individuals with control over the organization, are at risk of losing their tax exemptions under either the private inurement doctrine (if insiders are involved) or the more encompassing private benefit doctrine. *See, e.g., United Cancer Council,* 165 F.3d at 1179-80 (remanding for determination whether the charity was operated exclusively for charitable purposes rather than for the private benefit of its professional fundraisers).[12] Indeed, compensation for performance of services to disqualified persons that exceeds the value of the consideration is the principal focus of IRS's new authority to tax excess benefit transactions, which are, in essence, private inurement transactions. *See* Hopkins, *supra,* at 206-14; Hopkins & Tesdahl, *supra,* Chapter 4; *cf. Caracci v. Commissioner,* 118 T.C. 379 (2002) (upholding imposition of sanctions on excess benefit transactions where nonprofit home health care organizations transferred their assets to for-profit entities for less than market value).

In sum, if charities fail to comply with state registration and reporting requirements, engage in charitable solicitations that actually are fraudulent, enter into fundraising or other contracts that are not at arms length, engage in self-dealing or related-party transactions with controlling individuals or entities without adequate consideration, are grossly mismanaged, or, for whatever reason, are not operated exclusively for charitable purposes, both the states and the federal government have ample authority to respond without running afoul of the First Amendment.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to affirm the judgment of the Illinois Supreme Court.

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[12] *See also Church of Scientology of California v. Commissioner,* 823 F.2d 1310 (9th Cir. 1987); *Church By Mail, Inc. v. Commissioner,* 765 F.2d 1387 (9th Cir. 1985); *Airlie Found'n, Inc. v. United States,* 826 F. Supp. 537 (D.D.C. 1993), *aff'd,* 55 F.3d 684 (D.C. Cir. 1995) (per curiam); *American Campaign Academy v. Commissioner,* 92 T.C. 1053 (1989).

Respectfully submitted,

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APPENDIX

The foregoing brief is submitted on behalf of the following 176 nonprofit organizations:

American Academy of Family, Leawood, Kansas
American Association of State Troopers, Tallahassee, Florida
American Breast Cancer Foundation, Inc., Baltimore, Maryland
American Cell Therapy Research Foundation, Clarksburg, Maryland
American Charities for Reasonable Fundraising Regulation, Inc., Arlington, Virginia
American Council of the Blind, Washington, D.C.
American Council of the Blind Enterprises and Services, Inc., Minneapolis, Minnesota
American Diabetes Association, Alexandria, Virginia
American Health Assistance Foundation, Clarksburg, Maryland
American Humane Association, Englewood, Colorado
American Institute for Cancer Research, Washington, D.C.
Americas Second Harvest, Chicago, Illinois
Amnesty International of the USA, New York, New York
ARRISE Centers, Inc., Glen Ellyn, Illinois
Associated Fire Fighters of Illinois, Springfield, Illinois
Association of Marian Helpers, Stockbridge, Virginia
Association of the Miraculous Medal, Perrville, Missouri
Blinded Veterans Association, Washington, D.C.
Bread for the World, Washington, D.C.
Cal Farley's Boys Ranch and Affiliates, Amarillo, Texas
Cancer Care, New York, New York
Cancer Recovery Foundation of America, Harrisburg, Pennsylvania
Central Pennsylvania Food Bank, Harrisburg, Pennsylvania
Childhelp, Inc., Scottsdale, Arizona
Childhood Leukemia Foundation, Inc., Brick, New Jersey
Children Awaiting Parents, Inc., Rochester, New York
Children International, Kansas City, Missouri
Children's Hunger Relief Fund, Santa Rosa, California

Children's Organ Transplant Association,
Bloomington, Indiana
Children's Wish Foundation International, Atlanta, Georgia
Christian Appalachian Project, Lancaster, Kentucky
Concerned Women for America, Washington, D.C.
Concerns of Police Survivors, Camdenton, Missouri
Council for Government Reform, Arlington, Virginia
Covenant House, New York, New York
Dakota Boys Ranch Association, Minot, North Dakota
Defeat Diabetes Foundation, Inc., Madeira Beach, Florida
Disabled American Veterans, Cincinnati, Ohio
Doris Day Animal League, Washington, D.C.
Ducks Unlimited, Memphis, Tennessee
Eastern Paralyzed Veterans Association,
Jackson Heights, New York
Elderhostel, Inc., Boston, Massachusetts
Endometriosis Association, Milwaukee, Wisconsin
Food For The Poor, Inc., Deerfield Beach, Florida
Food Bank of the Rockies, Denver, Colorado
Food Bank of the Southern Tier, Elmira, New York
Franciscan Friars of the Atonement-Graymoor,
Garrison, New York
Freedom from Hunger, Davis, California
Girls Incorporated, New York, New York
Good Shepherd Food Bank, Auburn, Maine
Guide Dog Foundation for the Blind, Inc.,
Smithtown, New York
Guiding Eyes for the Blind ,Yorktown Heights, New York
Haggai Institute for Advance Leadership Training, Inc.,
Norcross, Georgia
HALT, Inc.—An Organization of Americans for Legal Reform,
Washington, D.C.
Have A Heart Children's Cancer Society, Inc.,
Levittown, New York
Help Hospitalized Veterans, Winchester, California
Hemophilia Association of New York, Inc.,
New York, New York

Hospitaller Brothers of St. John of God, Westville, New Jersey
Infact, Boston, Massachusetts
Inner-City Scholarship Fund, Inc., New York, New York
International Association of Fire Fighters, Washington, D.C.
International Fund for Animal Welfare,
Yarmouthport, Massachusetts
Iowa Professional Firefighters, West Des Moines, Iowa
Israel Children's Cancer Foundation, Inc.,
New York, New York
Kentucky Special Olympics, Inc., Frankfort, Kentucky
Kids Wish Network, Inc., Oldsmar, Florida
Lifesavers, Inc., Lancaster, California
Little Shelter Animal Adoption Center, Inc.,
Huntington, New York
March of Dimes Birth Defects Foundation,
White Plains, New York
Marine Corps Heritage Foundation, Quantico, Virginia
Mays Mission for the Handicapped, Heber Springs, Arkansas
Messengers of Christ—Lutheran Bible Translators, Inc.,
Aurora, Illinois
Michigan Professional Fire Fighters Union, Trenton, Michigan
Missionary Servants of the Most Holy Trinity dba
Trinity Missions, Silver Spring, Maryland
Missouri State Council of Fire Fighters, Kansas City, Missouri
Moose Charities, Inc., Mooseheart, Illinois
Mothers Against Drunk Driving, Irving, Texas
Multiple Sclerosis Association of America,
Cherry Hill, New Jersey
Multiple Sclerosis Foundation, Fort Lauderdale, Florida
Muscular Dystrophy Family Foundation, Indianapolis, Indiana
National Association for the Terminally Ill,
Shelbyville, Kentucky
National Children's Cancer Society, St. Louis, Missouri
National Coalition of Prayer, Inc., Springville, Tennessee
National Committee to Preserve Social Security and Medicare,
Washington, D.C.
National Federation of the Blind, Baltimore, Maryland

National Humane Education Society,
Charles Town, West Virginia
National Law Enforcement Officers Memorial Fund,
Washington, D.C.
National Multiple Sclerosis Society, New York, New York
National Museum of Women in the Arts, Washington, D.C.
National Troopers Coalition, Howell, Michigan
National Trust for Historic Preservation, Washington, D.C.
North Shore Animal League of America,
Port Washington, New York
Notre Dame India Mission, Chardon, Ohio
Ohio Right to Life Society, Inc., Columbus, Ohio
Omega Institute for Holistic Studies, Rhinebeck, New York
Osmond Foundation for the Children of the World
Salt Lake City, Utah
Paralyzed Veterans of America, Washington, D.C.
Pennsylvania Professional Firefighters Association,
Harrisburg, Pennsylvania
People for the American Way, Washington, D.C.
Plan International - USA, Warwick, Rhode Island
Priests of the Sacred Heart, Hales Corners, Wisconsin
Professional Firefighters of Utah, Farmington, Utah
Professional Firefighters of Wisconsin, Inc.,
Waukesha, Wisconsin
Project on Government Oversight, Washington, D.C.
ProLiteracy Worldwide, Syracuse, New York
Public Citizen, Inc., Washington, D.C.
Public Citizen Foundation, Inc., Washington, D.C.
Reach Our Children, St. Louis, Missouri
Sacred Heart League, Walls, Mississippi
Salesian Missions, New Rochelle, New York
Save A Child Foundation, Flint, Montana
Second Harvest Foodbank of Eastern Tennessee,
Knoxville, Tennessee
Shiloh International Ministries, Inc., La Verne, California
Southern Poverty Law Center, Montgomery, Alabama
Special Olympics, Inc., Washington, D.C.

Special Olympics Alabama, Inc., Montgomery, Alabama
Special Olympics Arizona, Inc., Phoenix, Arizona
Special Olympics Arkansas, Inc., North Little Rock, Arkansas
Special Olympics Colorado, Inc., Denver, Colorado
Special Olympics Connecticut, Inc., Hamden, Connecticut
Special Olympics Delaware, Inc., Newark, Delaware
Special Olympics District of Columbia, Inc., Washington, D.C.
Special Olympics Florida, Inc., Clermont, Florida
Special Olympics Georgia, Inc., Atlanta, Georgia
Special Olympics Hawaii, Inc., Honolulu, Hawaii
Special Olympics Illinois, Inc., Normal, Illinois
Special Olympics Indiana, Inc., Indianapolis, Indiana
Special Olympics Iowa, Inc., West Des Moines, Iowa
Special Olympics Kansas, Inc., Mission, Kansas
Special Olympics Louisiana, Inc., Hammond, Louisiana
Special Olympics Maine, Inc., South Portland, Maine
Special Olympics Maryland, Inc., Columbia, Maryland
Special Olympics Massachusetts, Inc.,
Hathorne, Massachusetts
Special Olympics Michigan, Inc., Mount Pleasant, Michigan
Special Olympics Minnesota, Inc., Minneapolis, Minnesota
Special Olympics Missouri, Inc., Jefferson City, Missouri
Special Olympics Montana, Inc., Great Falls, Montana
Special Olympics Nebraska, Inc., Omaha, Nebraska
Special Olympics Nevada, Inc., Las Vegas, Nevada
Special Olympics New Hampshire, Inc.,
Manchester, New Hampshire
Special Olympics New Mexico, Inc.,
Albuquerque, New Mexico
Special Olympics North Dakota, Inc.,
Grand Forks, North Dakota
Special Olympics Northern California, Inc.,
Pleasant Hills, California
Special Olympics Ohio, Inc., Columbus, Ohio
Special Olympics Oklahoma, Tulsa, Oklahoma
Special Olympics Pennsylvania, Inc.,
Norristown, Pennsylvania

Special Olympics Rhode Island, Inc., Warwick, Rhode Island
Special Olympics South Carolina, Inc.,
Columbia, South Carolina
Special Olympics South Dakota, Inc.,
Sioux Falls, South Dakota
Special Olympics Southern California, Inc.,
Culver City, California
Special Olympics Tennessee, Inc., Nashville, Tennessee
Special Olympics Texas, Inc., Austin, Texas
Special Olympics Virginia, Inc., Richmond, Virginia
Special Olympics Washington, Inc., Seattle, Washington
Special Olympics West Virginia, Inc.,
Charleston, West Virginia
Special Olympics Wisconsin, Inc., Madison, Wisconsin
St. Anthony's Guild, New York, New York
St. Elizabeth Mission Society, Inc., Allegany, New York
St. Francis Missions, St. Francis, South Dakota
St. Joseph's Indian School, Chamberlain, South Dakota
Support Our Aging Religious!, Silver Spring, Maryland
The Arc of the United States, Silver Spring, Maryland
The Center for Food Safety, Washington, D.C.
The Committee for Missing Children, Lawrenceville, Georgia
The Magic Foundation, Oak Park, Illinois
The National Center for Public Policy Research,
Washington, D.C.
The Patagonia Land Trust, Mill Valley, California
The V Foundation, Cary, North Carolina
United States Sportsmen's Alliance Foundation,
Columbus, Ohio
Utah Special Olympics, Inc., Salt Lake City, Utah
Vermont Public Television, Colchester, Vermont
Vermont Special Olympics, Inc., Williston, Vermont
Veterans Charitable Foundation, Inc., Boynton Beach, Florida
Vietnam Veterans Memorial Fund, Washington, D.C.
Wheat Ridge Ministries, Itasca, Illinois
World Emergency Relief, Carlsbad, California